

San Francisco Law Library

No.


Presented by

.....

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

In the United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC COAST COMPANY, a Corporation,
Appellant,

vs.

GEORGE E. JAMES and EDWARD WEBSTER,
Appellees.

APPEAL FROM DISTRICT COURT FOR DIS-
TRICT OF ALASKA, DIVISION
NUMBER ONE.

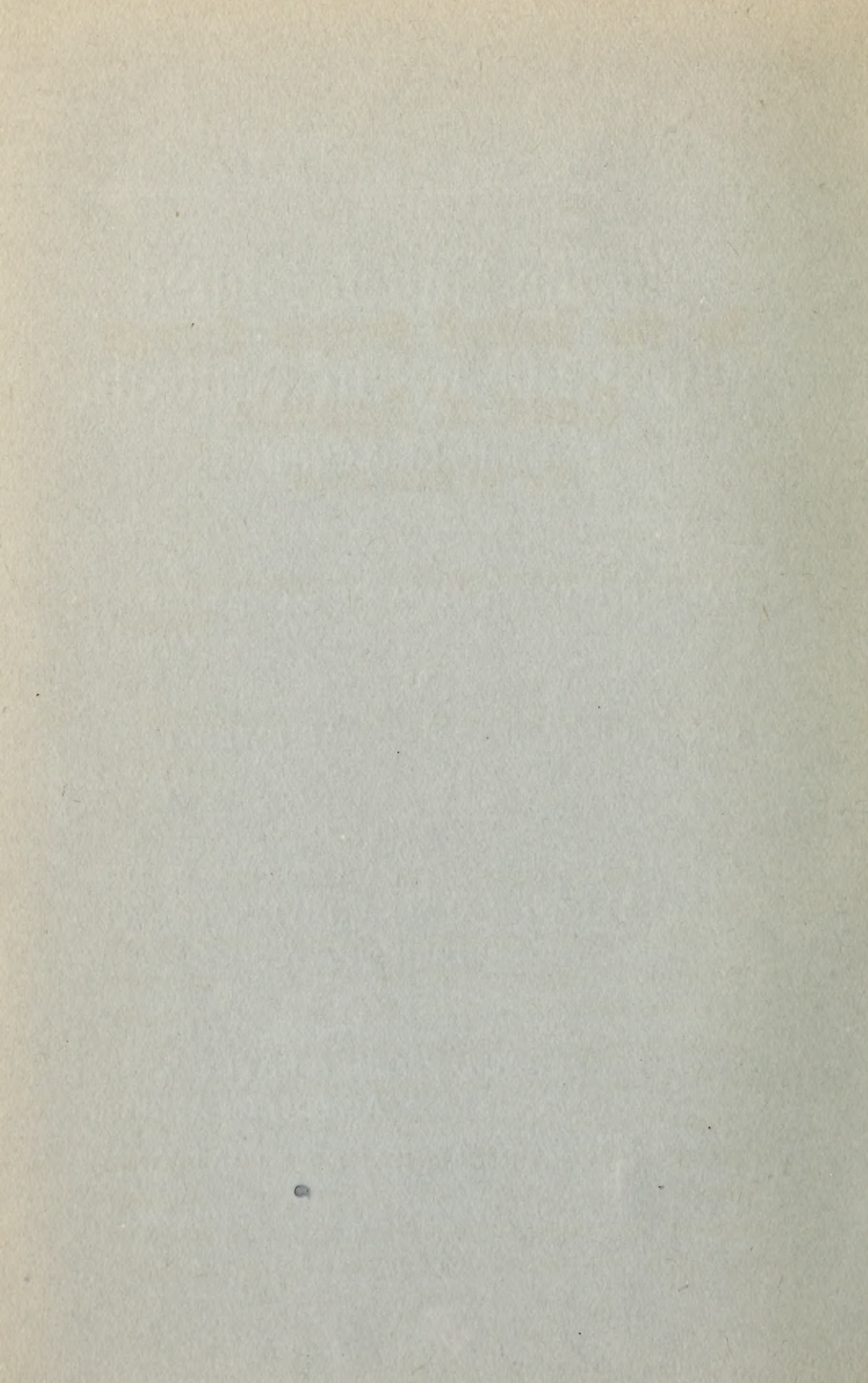
Brief of Appellant

SHACKLEFORD & BAYLESS,
Attorneys for Appellant.

FARRELL, KANE & STRATTON,
Of Counsel, Seattle, Wash.

Filed

OCT 10 1915



**In the United States Circuit
Court of Appeals
For the Ninth Circuit**

PACIFIC COAST COMPANY, a Corporation,
Appellant,

vs.

GEORGE E. JAMES and EDWARD WEBSTER,
Appellees.

STATEMENT OF THE CASE

This is a suit in equity by plaintiff below, appellant here, seeking to enjoin the driving of piles and the construction of a wharf upon certain tide lands, claimed by plaintiff, in front of Blocks O, P, Q, R, S and T, in the Townsite of Juneau, Alaska. There was a cross bill filed by the defendant praying for similar injunctive relief. At the hearing upon the respective orders to show cause, both parties were restrained pendente lite from driving piles. Upon the trial on the merits, the defendant was awarded the property

in controversy, described as the 113 feet of tide lands in front of said Blocks S and T; and plaintiff was perpetually enjoined from asserting any title to the property and from interfering with or obstructing defendant's possession. From that judgment plaintiff has appealed.

The 19 assignments of error (Rec. pp. 818 et seq.) bring to the attention of the Court every phase of the single question to be decided here, which is whether or not appellant has title to, and right to the possession of, the tide lands in dispute.

We claim that the undisputed testimony in this case shows the following state of facts: On March 6, 1881, M. W. Murry located, claimed and went into the possession of a tract of land 600 feet square about one-eighth of a mile to the eastward of the settlement known as Rockwell (now Juneau), Alaska. *This location was partly upon upland and partly upon tide lands.* The description in Murry's location notice (Rec. p. 610) shows that two of the corner stakes were placed at low water mark and that the westerly line of the wharfsite ran along low water mark, between these two points. The location notice was afterwards recorded with the local recorder, under the miners' rules and regulations, on the 12th of March, 1881 (Rec. p. 610).

Gold was discovered in Gold Creek near the present Town of Juneau in the fall of the year 1880, causing the first mining excitement in Alaska. In the spring of 1881 a rush of miners occurred, and a set-

tlement was made along the beach of Gastineau Channel, near the mouth of Gold Creek. This settlement was first known as Rockwell and afterwards as Juneau.

In 1881 there was no civil government act applicable to Alaska; no governmental organization had been created by Congress for this portion of the public domain, and whatever property rights were recognized and protected were so recognized and protected by common consent of the miners and citizens. A meeting of the miners and citizens of Rockwell (now Juneau) was held on the 21st of March, 1881 (Rec, p. 611) and a committee appointed to lay out a water front line, cross streets, determine the size of lots, etc., and report at a meeting to be held on March 26, 1881. On that date the question of the location of Captain Murry was presented at the adjourned meeting and the miners and citizens, realizing that the building of a wharf by Captain Murry would be of public benefit, thereupon unanimously passed a resolution endorsing and recognizing Captain Murry's rights, and resolving that by their future acts they would recognize his rights to the wharfsite and improvements (Rec. pp. 612, 613).

The wharf was built by Captain Murry at the center of his wharfsite and became known as the Carroll-Murry wharf. Construction work was commenced in August or September, 1881, and was completed in the spring of 1882. The wharf consisted of a wharf proper, constructed of cribbing or logs, and upon this substantial warehouse and coal house buildings were

erected. From the cribbing an approach extended over the tide lands, about 140 feet to the face of the dock, which was built in the shape of the letter "T," and was about 40x60 feet in dimensions. Two piles were driven in the tide lands between high and low tide, on the north and south limits of the tract, and were used both to define the boundaries of the wharfsite and also in mooring vessels at the face of the wharf. From 1882 to 1894 the Carroll-Murry wharf was the only one in Juneau, and all vessels which landed there ran lines ashore in stress of weather and at other times, to these two piles in order to hold the ships fast to the dock. This practice of running lines ashore to the two piles on the tide lands was necessary for the safety of the ship on account of the smallness of the face of the wharf, and was followed as long as the Carroll-Murry wharf was maintained as a public dock, which was during the period from 1882 to 1894. The wharfsite and the buildings and improvements situated thereon, from 1882 to 1894, were continuously used and occupied by appellant and its grantors. Beginning with the year 1894 the use of the wharf by ocean-going vessels was gradually discontinued and such ships landed at another wharf of the appellant, which had then been constructed nearer to the business center of Juneau, although the Carroll-Murry wharf was used until 1896 as a public dock. After that time this wharf was not frequented by deep sea vessels. Thereafter the wharf and the blocks of land immediately adjoining the wharf as well as the wharf buildings and im-

provements, were leased by the appellant and used by its tenants variously as a sardine cannery, smokehouse, glove factory and storage warehouse; and the wharf proper was used as a landing place by the smaller fishing craft. A portion of the wharf building was also used as a foundry by the Forrest Iron Works under lease from appellant. From 1894 the old wharf, together with the buildings and improvements situated upon the wharfsite, were continuously occupied for the purposes aforesaid by tenants of appellant and its granors, taxes were paid by appellant, and a bona fide claim of title to the whole 600 feet of tide lands described in the Murry location notice was made.

See testimony Webster (Rec. pp. 66-86, 366-377).

See testimony Wells (Rec. pp. 87-116).

See testimony Winter (Rec. pp. 382-390).

See testimony Swan (Rec. pp. 263-298).

See testimony Ewing (Rec. pp. 119-130, 361-365).

See testimony Dautrick (Rec. pp. 334-359).

See deposition Captain Lloyd (Rec. pp. 795-803, 785-793).

See deposition Captain Hunter (Rec. pp. 722-742).

See Plaintiff's Exhibit No. 23 (Rec. p. 691), a photograph showing the S. S. Queen, a vessel 331 feet long (Rec. p. 331), at the Carroll-Murry wharf, with head and stern lines running ashore (Plaintiff's Exhibits Nos. 20 and 19).

The Carroll-Murry wharfsite and the whole thereof was conveyed by mesne conveyances executed between 1884 and 1898 to appellant's grantors. Appellant acquired title to the wharfsite, uplands and tide lands, including the portion in dispute herein, together with the improvements thereon, by deeds executed in 1898 (Rec. pp. 614-690), and has never had the intention of abandoning any portion of the same. But, on the contrary, appellant intended to construct a larger wharf having a face of 600 feet upon that site (Rec. pp. 120, 121, 122, 697). The wharfsite was subdivided into lots and blocks, of which Blocks R, S and T are portions (Rec. p. 670).

This was the situation in 1900. On or about April 15th of that year the appellee commenced landing rafts and scows upon a portion of the tide lands of the wharfsite, and casually and intermittently continued to land such scows and rafts thereon until 1905. Appellee never at any time defined the boundaries of the land now claimed by him, by stakes, fences or monuments on the ground. He constructed no permanent improvements upon said premises prior to the year 1905. In that year he constructed a small platform and in 1906 a gridiron. In 1907 he erected a westerly approach from lower Franklin Street to the gridiron, and in 1912 constructed an easterly approach from lower Franklin Street. These structures cover 113 feet of tide lands in front of Blocks S and T, and occupy all the ground claimed by appellee. At the time of the institution of this action he had no other improve-

ments on said ground. Appellee lays no claim to the land by virtue of any deed, location notice or other paper writing which would be color of title, but claims the same by virtue of his use, possession and occupation. Appellee's possession was not openly, notoriously and continuously *adverse* to appellant for the period of ten years or for any other period.

See testimony James (Rec. pp. 407-516).

See testimony Webster (Rec. pp. 241-262, 366-381).

Appellee claims to have occupied the premises in dispute from April 15, 1900, to the date this suit was commenced. During this period appellant exercised the following acts of ownership over the same. In 1901, 1902 and 1903 G. H. Messerschmidt occupied the disputed premises under permission from the company, and in 1905 Charles E. Davidson, as receiver of the Willson-Sylvester Estate, erected a platform thereon and occupied the same during the summer of 1905 under a written lease from the appellant. The remainder of the wharfsite tide lands and the buildings thereon were occupied by tenants of appellant and appellant has at all times paid the taxes on the property. Its agents have been instructed to keep the same free of squatters and protected in every way possible. Shortly after this action was instituted a resurvey of the property was made and different numbers given to the lots and blocks (Rec. pp. 678, 804).

See testimony Messerschmidt (Rec. pp. 525-557, 567-576).

See testimony Davidson (Rec. pp. 576-585).

See testimony Dautrick (Rec. pp. 334-360, 557-567).

See testimony Swan (Rec. pp. 263-298).

See testimony Ewing (Rec. pp. 361-365).

See Plaintiff's Exhibit No. 22 (Rec. p. 687).

ARGUMENT.

From the undisputed facts we claim as matters of law that:

1. APPELLANT, HAVING USED, OCCUPIED AND CLAIMED, UNDER COLOR AND CLAIM OF TITLE, THE WHOLE CARROLL-MURRY WHARFSITE, INCLUDING THE TIDE LANDS IN CONTROVERSY, FROM 1881 UNTIL, 1894, AND HAVING USED, OCCUPIED AND CLAIMED AS AFORESAID THE GREATER PORTION OF SAID WHARFSITE FROM 1894 UNTIL THE DATE OF THE COMMENCEMENT OF THIS ACTION, AND NEVER HAVING ABANDONED THE PROPERTY IN DISPUTE, AND THE APPELLEE HAVING ACQUIRED NO TITLE BY ADVERSE POSSESSION, APPELLANT IS ENTITLED TO THE POSSESSION OF THE DISPUTED PREMISES AND TO THE INJUNCTIVE RELIEF PRAYED FOR.

This proposition, for convenience, we will subdivide as follows:

(A).—APPELLANT, HAVING USED, OCCUPIED AND CLAIMED THE WHOLE OF THE

CARROLL-MURRY WHARFSITE, INCLUDING THE PREMISES IN DISPUTE, ON AND PRIOR TO MAY 17, 1884, AND NOT HAVING ABANDONED THE SAME, IS PROTECTED IN ITS POSSESSION BY THE ACT OF CONGRESS PASSED ON THAT DATE.

(B).—APPELLANT, HAVING BEEN IN ACTUAL POSSESSION OF THE GREATER PORTION OF THE CARROLL-MURRY WHARFSITE AND CLAIMING THE WHOLE THEREOF UNDER COLOR AND CLAIM OF TITLE, MUST BE CONSIDERED TO HAVE BEEN, AT THE DATE APPELLEE ENTERED UPON THE PREMISES IN DISPUTE, IN ACTUAL POSSESSION OF THE SAME.

(C).—THE POSSESSION OF APPELLEE, NOT HAVING BEEN CONTINUOUS AND ADVERSE TO APPELLANT, COULD NEVER RIPEN INTO TITLE.

(D).—APPELLANT, HAVING USED, OCCUPIED AND CLAIMED THE WHOLE OF THE CARROLL-MURRY WHARFSITE, INCLUDING THE PREMISES IN DISPUTE, ON AND PRIOR TO MAY 17, 1884, AND NOT HAVING ABANDONED THE SAME, IS PROTECTED IN ITS POSSESSION BY THE ACT OF CONGRESS ON THAT DATE.

The trial Judge, in his Memorandum of Decision, decided (Rec. p. 27) that "In 1884 plaintiff had use, occupation and claim of the tide land in controversy,

but after 1894 it did not continue the use or occupation of the tide land in controversy." No finding of fact, however, was made by the court to that effect, but since this part of the decision is based upon the undisputed evidence, it is apparent that the fact that from the date the Carroll-Murry wharfsite was located, on March 6, 1881, until the year 1894, every portion of it was used, occupied and claimed by appellant's grantors, was proven to the satisfaction of the trial court.

The trial court further decided, in effect, that appellant abandoned the premises in dispute when it discontinued the use of the Carroll-Murry wharf, in the year 1894 (Rec. p. 25), though no finding was made to that effect. However, the first finding of fact was that on April 15, 1900, the premises in dispute were vacant, unused, unoccupied, unappropriated land of the United States (Rec. p. 30). This was, considering the decision of the court, tantamount to a finding of abandonment.

At the outset, therefore, we are confronted with the question of abandonment, upon which the case turned in the court below.

The only evidence of abandonment by appellant of the premises in dispute prior to April 15, 1900, the date of Mr. James' first entrance on the property, is that from 1894 to 1900 the land was not actually used or occupied; but it must be remembered that the 113 feet of tide lands in dispute was a portion of the original Carroll-Murry wharfsite and that from 1894 to the date of this suit the remaining portion of the wharfsite

was occupied, used and the whole thereof claimed during all of said period, as it had been since the year 1881.

The conveyances introduced in evidence (Rec. pp. 614 et seq.) show a perfect chain of title from Murry to the Pacific Coast Company. The whole wharfsite, including the 113 feet of tide lands now claimed by Mr. James, was conveyed, the last conveyance having been executed in 1898, two years after vessels had ceased landing at the wharf. On March 21, 1898, patent was issued to Waterbury and Coolidge (Rec. pp. 644-648), and in said patent the whole wharfsite, including the 113 feet of tide lands now claimed by Mr. James, was described by metes and bounds. The conveyance of the whole wharfsite to the Pacific Coast Company, from Waterbury and Coolidge, executed April 1, 1898 (Rec. pp. 659-670), contained the same description. That circumstance in itself clearly indicated that a bona fide claim of ownership was made by appellant at the time these conveyances were executed and certainly negatived any intention to abandon said property.

There is no evidence of any intention on the part of appellant or its grantors to abandon the premises in dispute, and the mere fact that every portion of the Carroll-Murry wharfsite was not used after the year 1894 is not, as we expect to show, an abandonment of the premises.

The facts as shown by the evidence are that from 1882 down to 1894 appellant and its grantors actually

used, occupied and claimed the whole wharfsite (Rec. p. 94) and from 1894 have exercised numerous acts of ownership over and have claimed the whole wharfsite, including the premises in dispute; have leased portions of the same to various corporations and individuals (Rec. pp. 282-283, 366); have leased the property in dispute to Mr. Davidson (Rec. p. 270); have given permission to at least one other person, Mr. Messerschmidt, to occupy the same (Rec. pp. 339, 351, 528); and have paid all the taxes upon the property in dispute (Rec. pp. 276, 342, 356, 357, 362).

There is no evidence of any intention on the part of the Pacific Coast Company to abandon the property in dispute. On the contrary, it has been the intention of the company to construct on said wharfsite a larger wharf when business justified the undertaking, and it is the present intention to construct a wharf with a 600 foot face in order to accommodate the increased traffic due to the revival of business in Alaska (Rec. pp. 120-122).

No statute exists in Alaska by virtue of which it can be asserted that the non-user of real property will result in the loss of title thereto.

Abandonment is largely a question of intention. If a person in possession of land leaves it with the intention of returning, he does not abandon it. A mere failure to occupy land for a long period does not necessarily constitute an abandonment. Until abandonment, a person may recover against a trespasser, unless his action is barred by the statute of limitations. When

prior possession is once shown, there is no presumption of its loss. Abandonment must be made to appear affirmatively by the party relying upon it to defeat a recovery, and slight circumstances are admissible to indicate an intention not to abandon.

- Moon vs. Rollins*, 36 Cal. 333;
Phy vs. Hatfield, 135 Am. State Rep. 888;
Keane vs. Cannovan, 21 Cal. 291;
Sweeney vs. Riley, 42 Cal. 402;
St. John vs. Kidd, 26 Cal. 263;
Bell vs. Bedrock, Tunnel, etc. Co., 36 Cal. 214;
Weill vs. Lucerne Mining Co., 11 Nev. 200;
Watts vs. Spencer, 94 Pac. 39;
Hough vs. Porter, 98 Pac. 1083, and 102 Pac. 728;
Phillips vs. Hamilton, 95 Pac. 846;
Lindbloom vs. Rocks, 146 Fed. 660;
Booming Co. vs. Hubbell, 97 N. W. 157;
Whitman vs. Lifting, etc. Co., 116 N. W. 614;
Bayne vs. Brown, 118 Pac. 282;
Lyons vs. Andry, 87 Am. St. Rep. 299;
Crary vs. Dye, 208 U. S. 515;
North American E. Co. vs. Adams, 104 Fed. 404;
White's Guardian vs. Martin, 2 Alaska 496;
Smith vs. Hope Mining Co., 45 Pac. 632;
Thorndyke vs. Alaska Perseverance Mining Co., 164 Fed. 657.

The undisputed testimony shows that appellant has never had the intention of abandoning the premises in dispute, and, measured by the rules laid down in the cases above cited, has by no overt act indicated such an intention. Without an intention to abandon, there can be no abandonment. Appellant was therefore entitled to the fourth finding of fact requested of the trial court (Rec. p. 809). We submit that Finding No. 1 (Rec. p. 30) was not supported by any evidence in the case.

Appellant, not having abandoned the premises in dispute, is entitled to the protection afforded by the Act of Congress of May 17, 1884. The first proviso of the eighth section of this Act (C. 53, 23 Stats. L., 24, 26; Compiled Laws of Alaska, p. 144) is as follows:

“Provided, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress:”

The proviso following the one just quoted is as follows:

“And provided further, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid:”

Congress, by this last proviso, expressly enacted that owners of mining claims should not be disturbed

in their possession but should be allowed to perfect their title under laws which were then in effect and extended to Alaska. There was no law in effect and extended to Alaska relating to the public domain other than mineral lands. So Congress enacted by the first proviso of the eighth section of the above Act that occupants of other than mineral lands, any lands, in fact, should not be disturbed in their possession of such lands but the terms under which they might acquire title were reserved for future legislation. Congress must have intended that occupants of other than mineral lands should ultimately be permitted to acquire title. This intention is evidenced by the method of dealing in the succeeding proviso with the rights of occupants of mineral lands. That Congress had such an intention was the view taken by the court in the case of *Young vs. Goldstein*, 97 Fed. 303.

The first proviso of the eighth section of the Act of 1884 has been construed many times by the district court for the District of Alaska, and several times by Circuit Court of Appeals for the Ninth Circuit. In all these cases it is held that a person claiming land under and by virtue of the above section, deriving title from Indians, *or other persons*, who were in possession of such land, and who claimed the same prior to the passage of said Act, has a good title against every one subsequently claiming it, and against the United States, until Congress shall provide for the disposition of such lands by enacting a law permitting such persons to acquire title, as was contemplated in the Act of 1884.

Heckman vs. Sutter, 119 Fed. 83;
Carroll vs. Price, 81 Fed. 137;
Young vs. Goldstein, 97 Fed. 303;
Heckman vs. Sutter, 128 Fed. 393;
McCloskey vs. Pacific Coast Co., 160 Fed. 794;
Miller vs. Blackett, 47 Fed. 547;
Haltern vs. Emmons, 46 Fed. 452.

In *Carroll vs. Price*, 81 Fed. 137, Judge Delaney, in instructing the jury, construing the above section of the Act of 1884 (at page 139), says:

“When Congress enacted this law it undoubtedly had in view the condition of affairs in this country, and, in order to protect settlers upon the public lands here, incorporated into said act the proviso above mentioned, which is in the following language:

* * * Under this provision, all persons who are in the actual use and occupancy of tracts of public land in this district, or who had laid claim to such tracts or pieces of land at the time this law was enacted, are protected against intrusion, and their possession cannot be disturbed. This provision is a mandate to the general land office to the effect that it cannot grant title adversely to a citizen who is in actual possession or occupancy, *or who has a bona fide claim to** a piece or tract of public land in this district; and the court also construes this provision as a mandate to the court that it shall not disturb a citizen who is in actual possession, or who has a well-founded bona fide claim to lands in Alaska.”

And on page 140:

“These are things which you have a right to consider, on both sides of the case, for the purpose of de-

*The italics are ours.

termining this question of occupancy and possession, and a bona fide intention on the part of the claimant to hold the land. The possessory right in and to government lands, when once acquired, may be conveyed from one person to another, and instruments in writing making such conveyances are admissible in evidence, and may be considered by you as tending to establish possession."

And on page 142:

"The court therefore charges you that the United States holds paramount title to tide lands in this territory, and, where the right of navigation is not impaired, rights of possession by citizens of the United States to such tide lands will be determined by the same rules of law as govern similar rights on the uplands; and this court will apply to the tide lands the rules that American citizens may occupy, possess, use and improve the same, subject, however, to the paramount right of free navigation; and that the prior possession will determine the prior right, until 'future legislation by Congress,' as to uplands, or until the ultimate sovereign, whether state or federal, having title to tide lands, shall otherwise provide in relation thereto."

It is significant that the Court of Appeals has given full force and effect to the entire language of the proviso of the Act above quoted; holding that a person who was in the actual possession or occupancy, or who claimed the possession and right of possession of tide lands prior to May 17, 1884, could not be disturbed.

In *Young vs. Goldstein*, 97 Fed. 303, the court, on page 308, in part, held:

"In our opinion, the language used is susceptible of but one construction; i. e. that Congress guaranteed to all persons in possession of lands in Alaska at that date the right ultimately to acquire a perfect title to

the same. If anything less was intended, then the act is wholly meaningless. If Congress meant only to guaranty to them undisturbed possession for the time being, reserving the right to ultimately pass such laws as would confiscate the property to the government, or give it to another, then the act is worse than a mockery. If the expression 'the terms under which such persons may acquire title,' means anything, it means that at some future date the Congress will pass the needful legislation whereby their possession will ripen into perfect ownership. And until such legislation is enacted the 'future legislation' is yet to be achieved."

In *Heckman vs. Sutter*, 119 Fed. 83, which involved the title to certain tide lands in Alaska, the court, again construing the Act of 1884, in part said (page 88):

"When, in 1884, Congress undertook to provide a civil government for Alaska, it made of the territory a land district, located a United States land office at Sitka; put in full force and effect therein 'the laws of the United States relating to mineral claims and the rights incident thereto,' with certain conditions not necessary to be mentioned, withholding therefrom the application of 'the general land laws of the United States,' and expressly declaring 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.' Section 8, Act May 17, 1884 (23 Stat. 24). There has been no 'future legislation by Congress' that applies to the present case, for this case involves no question of purchase or entry, and concerns only the right of occupancy and use of certain of the lands of the United States, including a small strip of tide land, as against a similarly asserted right on the part of third persons, which occupancy and use in no manner interferes with

the right of navigation of the public waters. The prohibition contained in the act of 1884 against the disturbance of the use or possession of any Indian or other person of any land in Alaska claimed by them is sufficiently general and comprehensive to include tide lands as well as lands above high-water mark. Nor is it surprising that Congress, in first dealing with the then sparsely settled country, was disposed to protect its few inhabitants in the possession of lands, of whatever character, by means of which they eked out their hard and precarious existence. The fact that at that time the Indians and other occupants of the country largely made their living by fishing was no doubt well known to the legislative branch of the government, as well as the fact that that business, if conducted on any substantial scale, necessitated the use of parts of the tide flats in the putting out and hauling in of the necessary seines. Congress saw proper to protect by its act of 1884 the possession and use by these Indians and other persons of any and all lands in Alaska against intrusions by third persons, and so far has never deemed it wise to otherwise provide. That legislation was sufficient authority, in our opinion, for the decree of the court below securing the complainants in the use and possession of land which the evidence shows and the court found was held and maintained at the time of their disturbance therein by the defendants, and for years theretofore had been so held and maintained. The judgment is affirmed."

In a subsequent hearing between the same parties, reported in 128 Federal, 393, the court, commenting on the former decisions, on page 394, said:

"Further consideration has but confirmed us in the correctness of these views. The act of 1884 made no provision for the disposition of the title of any of the public domain except mineral lands; on the contrary, it thereby expressly withheld from Alaska the application of 'the general land laws of the United

States.' Section 8, Act May 17, 1884, C. 53, 23 Stat. 24, 26. Those general land laws are not, therefore, the source from which to derive the meaning of Congress in using the words 'any lands' in the proviso of the act of May 17, 1884, 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation *or now claimed by them**.' Having extended to Alaska the laws of the United States relating to mineral claims only, if Congress had intended to protect the Indians and other persons in their possession of or claim to such mineral claims only, one would naturally expect the intention to be manifested by the words 'such mineral claims,' or 'such mineral lands,' or other equivalent limited expression, and not by the broad and comprehensive words 'any lands,' used in the act of 1884. Nor is it reasonable to suppose that Congress intended the broad and comprehensive terms thus used by it to be limited by the interpretation put upon the term 'public lands' in the general land laws, which it expressly provided should not be in force in Alaska. In providing for a civil government for that territory, as it did by the act of 1884, Congress was dealing with the then condition of the country; and in providing for such a government it saw proper to protect the existing possession of any and all lands then held by the Indians or other persons in the territory. These, as Congress must have known, were at the time but few in number. It did not provide for the protection of the possession of any lands by any person or persons who might acquire possession or make claim thereto in the future. It is true that it has never been the policy of the United States to dispose of its tide lands, but, on the contrary, that its policy has always been to retain them for the benefit of the future state in which they might lie. But it is thoroughly settled that the United States has all the power of national and municipal government over its territories, and may, if it sees fit to do so, grant rights

*The italics are ours.

in or titles to the tide lands of its territories as well as the public lands therein situated above high-water mark. *Shively vs. Bowlby*, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, and the numerous cases there cited."

In the case of *McCloskey vs. Pacific Coast Co.*, 160 Fed. 794, on page 801, the court said concerning the Murry wharfsite:

"But notwithstanding that the theory upon which the court below awarded its injunction may have been erroneous, the injunction must not be disturbed if in the pleadings and the proofs we may discover any tenable ground upon which it may be sustained. We find such ground in the fact which is shown by the bill and in the proofs that the appellee's grantors at the date when the act of Congress of May 17, 1884, C. 53, 23 Stat. 24, was enacted, *claimed the possession and the right of possession** of all the tide lands in front of their property, and have ever since maintained such claim except so far as they have conceded the public use of the street and sidewalk. That act of Congress provided a civil government for Alaska, and, among other things, enacted 'that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation *or now claimed by them**, but the terms under which said persons may acquire title to said land is reserved for future legislation by Congress.' There has been no subsequent legislation affecting the right of possession thus recognized, and the protection thus afforded by the statute has not as yet been withdrawn. The appellee having this right of possession of the tide land between the roadway and the line of low tide could protect such possession by any appropriate suit or action."

Measured by these authorities, appellant, by virtue of the protection afforded by the Act of 1884, *supra*,

*The italics are ours.

is the owner of the tide lands themselves, at least until Congress provides for their disposition, and is not merely the owner of an easement over and across the same. The ownership of the tide lands comprehends the right to possess and enjoy the same and each and every part thereof.

Appellant being, as the testimony conclusively shows, in actual physical possession of the major portion of said wharfsite and claiming the whole of the same, including the ground in dispute at the time this suit was instituted, is entitled to be protected in its possession and right to the possession of the whole of said premises, including the portion in dispute.

(B).—APPELLANT, HAVING BEEN IN ACTUAL POSSESSION OF THE GREATER PORTION OF THE CARROLL-MURRY WHARFSITE AND CLAIMING THE WHOLE THEREOF UNDER COLOR AND CLAIM OF TITLE, MUST BE CONSIDERED TO HAVE BEEN, AT THE DATE APPELLANT ENTERED UPON THE PREMISES IN DISPUTE, IN ACTUAL POSSESSION OF THE SAME.

The undisputed testimony shows that prior to May 17, 1884, appellant's grantors were in the actual possession of the whole of the wharfsite, claiming the same adversely to all the world under a bona fide *claim of title*, to-wit: The Murry location notice of March 6, 1881; further, that on the 26th of March, 1881, this claim of title to the wharfsite was unanimously recog-

nized and endorsed by the miners and citizens of Rockwell (now Juneau) by the following resolution:

“Whereas, Captain M. W. Murry has located outside and to the east of the city a wharfsite and proposes at earliest opportunity to build a wharf and warehouse for the accommodation of vessels and steamers and for the benefit of all citizens alike, it is the sense of the meeting that we should encourage such an enterprise; therefore it is hereby “Resolved that the miners and citizens of the District and City, recognizing that such improvements would be a public benefit, hereby accept, endorse and recognize the rights of said Capt. Murry and will by our future acts endorse and recognize his rights to the said wharfsite and improvement.” (Rec. p. 612).

It is our contention that on May 17, 1884, this claim of title became *color of title* by the operation of the first proviso to the eighth section of the Act of 1884 (C. 53, 23 Stats. 24, 26), passed by Congress on said date. It is apparent from the language of the Act itself that this proviso gave such color of title.

The undisputed testimony further shows that on that date and for many years subsequent thereto the claim of the grantors of the appellant to the whole of the wharfsite was universally recognized by the miners and citizens of this community; also that the tract of tide lands 600 feet wide was reasonably limited as to size, and was in good faith occupied and claimed on and prior to May 17, 1884. This was the decision of the court (Rec. p. 24), based upon the uncontradicted testimony, though no finding of fact to that effect was made.

The trial court decided that appellant had no color of title, because, in his opinion, the Murry location notice was not color of title; but the learned judge failed to consider the other conveyances also relied upon by appellant to give color of title. Appellant does not rely solely upon the Murry location notice coupled with the first proviso of the eighth section of the Act of 1884 to give it color of title to the wharfsite. The quitclaim deeds to appellant and its grantors conveying the wharfsite, including the portion in dispute (Rec. pp. 614 et seq.) were each, we claim, color of title. One of these quitclaim deeds (Rec. p. 619) was a mesne conveyance acknowledged February 18, 1884, some three months prior to the passage of the Act of May 17, 1884. This deed we claim is also color of title.

That a quitclaim deed is color of title is elemental.

Archer vs. Biehl, 136 Fed. 113;

Tyee Consolidated Mining Co. vs. Langstedt,
136 Fed. 134.

As previously stated, the testimony is uncontradicted, and the court decided, that appellant and its grantors used, occupied and claimed the whole wharfsite during the period from 1881 to 1894. Such use, occupation and claim were maintained under valid quitclaim deeds, which were color of title. From 1894 appellant was in possession of the major portion of the wharfsite, claiming the whole thereof by virtue of other quitclaim deeds, which were also color of title. Being in actual possession of the major portion of the wharf-

site under color and claim of title, appellant must be considered to have been in constructive possession of the premises in dispute. This was the situation when Mr. James first entered the property, and it continued until this suit was instituted. We submit it was unnecessary for appellant to maintain actual foot possession of the premises in dispute, under these circumstances.

Green vs. Liter, 8 Cranch, 229; 3 L. Ed. 545;

Clarke vs. Courtney, 5 Peters, 819; 8 L. Ed. 140;

Miller's Heirs and Devisees vs. M'Intyre, 6 Peters, 731; 8 L. Ed. 320;

Ellicott vs. Pearl, 10 Peters, 412; 9 L. Ed. 475;

Hunnicut vs. Peyton, 102 U. S. 333; 26 L. Ed. 113;

Deputron vs. Young, 134 U. S. 241; 33 L. Ed. 923;

Archer vs. Biehl, 136 Fed. 113;

Tyce Consolidated Mining Co. vs. Langstedt, 136 Fed. 134.

(C).—THE POSSESSION OF APPELLANT, NOT HAVING BEEN CONTINUOUS AND ADVERSE TO APPELLANT, COULD NEVER RIPEN INTO TITLE.

In order to prevail in this action, appellee must prove that his possession was adverse to appellant. We fail to recollect any evidence of the adversity of his possession, nor was adverse possession pleaded by appellee. In fact, both in the pleadings and in the proof on behalf of appellee, his possession was referred to as

being open, notorious use and occupation. The term *adverse* was conspicuous by its absence. Nor was there any intimation that the acts of Mr. James in using the property were in any sense adverse to appellant. Likewise his use and occupation prior to 1905 was neither exclusive, continuous or hostile—all necessary elements of adverse possession—and in 1905 a break and interruption of his use and occupation occurred through the erection and occupation of a landing platform 60 or 70 feet square (Rec. pp. 582, 583), on the premises in dispute, by Mr. Davidson, under lease from appellant in the year 1905 (Rec. p. 579). This platform and the whole of the premises in dispute were exclusively occupied by appellant's tenant without let or hindrance from appellee (Rec. pp. 468-472).

The statute of limitations without color of title is 10 years in Alaska (Compiled Laws of Alaska, Section 836). That bar has not tolled, and as Mr. James has admitted having no color of title (Rec. p. 481), he is therefore unable to take advantage of the seven-year statute of limitations under color and claim of title (Compiled Laws of Alaska, Section 1874).

There is a virtual agreement by all the authorities that in order to bar the true owner of land from recovering from an occupant in adverse possession and claiming ownership through the operation of the statute of limitations, the adverse possession must have been for the whole period prescribed by the statute, actual, open, visible and notorious, continuous without a break and

hostile or adverse to the true owner's title and the world at large.

Doswell vs. De La Lanzo, 20 How. 29; 15 L. Ed. 824;

Armstrong vs. Morrill, 14 Wall. 120; 20 L. Ed. 765;

Ward vs. Cochran, 150 U. S. 597; 37 L. Ed. 1195;

Sharon vs. Tucker, 144 U. S. 533; 36 L. Ed. 532;

Shuffleton vs. Nelson, 2 Saw. 540; Fed. Cas. No. 12822;

Eastern Oregon Land Co. vs. Cole, 92 Fed. 949.

If any of these characteristics is wanting, the bar of the statute is not complete.

Eastern Oregon Land Co. vs. Cole, 92 Fed. 949.

It is conceded that Mr. James has no color of title (Rec. p. 481) and that title to the tide lands in question is in the United States. Until patent has been issued, the statute of limitations without color of title, which is 10 years in Alaska (Compiled Laws of Alaska, Section 836), does not commence to run. The possession of the appellee, therefore, being without color of title, no matter how long it continued, was not such as would ever ripen into a title which could be asserted against the United States or made the basis of a title against subsequent grantees, for the rule is well settled that rights cannot be acquired in public lands by the statute of limitations.

Gibson vs. Chouteau, 13 Wall. 92; 20 L. Ed. 534;

Redfield vs. Parks, 132 U. S. 239; 33 L. Ed. 327;

Slaight vs. N. P. Ry. Co., 205 U. S. 122; 51 L. Ed. 738; 39 Washington State Reports 576;

McIlhinney vs. Ficke, 61 Mo. 329;

James vs. Wilkinson, 42 Pac. 735;

Tyee Consolidated Mining Co. vs. Langstedt, 136 Fed. 124.

The reasoning upon which these decisions are based is absolutely sound, for there can be no interference with the primary and absolute right of disposition of the soil by the government. If the rule were otherwise, squatters could gobble up the entire domain belonging to the state or government and hold it as against the state's or government's grantee, and thus deprive the state or the government of its absolute and primary right of disposing of its land.

Under such a state of facts we contend that appellee has been at all times mentioned in his answer and is now a tenant at will or by sufferance of the appellant, or a naked trespasser, entitled to occupy the premises in dispute so long as it suits the convenience of the appellant but not longer.

In the case of *Jasperson vs. Scharnikow*, 150 Fed. 571, 15 L. R. A. (N. S.), at page 1182, Judge Gilbert, quoting the language of the trial court, well said:

"This idea of acquiring title by larceny does not go in this country. A man must have a bona fide claim or believe in his own mind that he has got a right as

owner when he goes upon land that does not belong to him, in order to acquire title by occupation and possession. The defendant's evidence fails to show any claim of right in Bryant when he went on the land. There is not a particle of testimony that squints in the direction that he supposed that he had any right, or that he went there for any other purpose than to acquire right, if he could do so by holding long enough without molestation."

In the case at bar there was no testimony submitted on behalf of the defendant tending to show that Mr. James had a bona fide claim to the property at the time he entered thereon, or that he had or supposed he had any right or that he went there for any other purpose than to acquire a right, provided he could do so by holding long enough without molestation. The rule of law pronounced by this court in the Jasperson case should therefore be applicable here.

To recapitulate, we rely upon (1) a valid location of a wharfsite recognized by everyone and protected by the provisions of the Act of 1884; (2) a total absence of any evidence indicating an intentional abandonment of the claim; and (3) a total lack of adverse possession on the part of appellee as defined by our statute and the authorities.

There has been no legislation subsequent to the Act of 1884 removing the protection of that law from appellant. Appellee has failed in his obligation of proving that appellant has abandoned the property in dispute and has likewise failed to establish his adverse possession.

There can be no question about the location of the entire wharfsite, which includes the portion involved in this controversy, and a bona fide intention on the part of appellant to hold the land. There is an utter absence of any evidence which would justify a finding to the effect that appellant or its predecessors in interest deliberately or intentionally, or at all, abandoned the land in controversy. There is not the slightest trace of color of title to the claim of the appellee. We submit that it will be impossible to distinguish the facts in this case from those referred to in the case of *McCloskey vs. Pacific Coast Company*, 160 Fed. 794, as recited by this court, to-wit (p. 801):

"We find such ground in the fact, which is shown by the bill and in the proofs, that the appellee's grantors at the date when the Act of Congress of May 17, 1884, C. 53, 23 Stat. 24, was enacted, claimed the possession and the right of possession of all the tide lands in front of their property, * * *"

We contend that the finding of this court should be that appellant has acquired a title to the ground in dispute which will not be disturbed, for to do so would give judicial sanction to a mode of acquiring title to property which is directly in conflict with its decisions. Under the facts in this case, this property cannot be taken from appellant either by judicial decision or by legislation, for Congress has pledged itself to subsequently provide a method for disposing of the property to those who claimed it on the 17th of May, 1884.

Resting upon these grounds and invoking the doctrine of judicial precedent, we urge that the judgment

of the District Court be reversed and that appellant be granted the relief prayed for in its bill.

Respectfully submitted,
SHACKLEFORD & BAYLESS,
Attorneys for Appellant.

FARRELL, KANE & STRATTON,
Of Counsel, Seattle, Wash.

NO. 2596

In the
United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC COAST COMPANY,
A Corporation

Appellant,

vs.

GEORGE E. JAMES and EDWARD WEBSTER,
Appellees

Brief of George E. James, Appellee

Upon Appeal from the District Court for the
Territory of Alaska, Division No. 1

GUNNISON & ROBERTSON,
ROYAL A. GUNNISON,
Attorneys for Appellee

Filed this _____ day of November, 1915

Clerk

By _____ Deputy



ERRATA

Page 18, line 24, change "warfinger" to "wharfinger."

Page 21, line 22, change period to comma, make small a in "and".

Page 22, line 21, should read "any part thereof" instead of "any part of".

Page 30, line 19, word "it" should be "its".

Page 38, line 28, word "of" should be "or".

Page 39, line 6, strike one of the words "right".

Page 43, last line, change word "diversed" to "divested".

Page 54, line 29, strike out words "prior to".

Page 55, line 26, should be stricken, and between lines 27 and 28, insert "that is, 40 feet on each side of the center. No part".

Page 56, line 6, change "testfies" to "testified".

Page 56, line 13, change word "Appellent" to "Appellee".

Page 57, line 7, change "meane" to "mesne".

Page 64, line 14, after word "such", insert word "kind".

Page 68, line 15, period should be substituted for comma.

Page 69, line 2, word "adversed" should be "adverse".

Page 72, line 18, omit word "or".

Pages 76-77, the last word on page 76 and the first word on page 77 should be "constitutes".

Page 77, line 16, word "at" should be "as".

Page 77, lines 25-26-27, should read "and in April, 1900, "when James first went upon this tract and began his use, etc."

Page 81, lines 4-5-6 should read "every action shall be "prosecuted in the name of the real party in interest, except "as otherwise provided in Section 859, * * * (C. L. A. 1913, Section 857).



In The
United States
Circuit Court of Appeals
for the Ninth Circuit

PACIFIC COAST COMPANY,
A Corporation

Appellant,

vs.

GEORGE E. JAMES and EDWARD
WEBSTER,

Appellees

No. 2596

Brief of GEORGE E. JAMES, Appellee
Upon Appeal from the District Court for the Territory
of Alaska, Division Number One

In this suit, Appellant seeks to enjoin the Appellee, George E. James, from constructing certain additional improvements on tidelands at the southern end of the City of Juneau, Alaska. The

real solution of the controversy is to be found in the interpretation of Sec. 8, of Chap. 53, (23 Stat. L. 26) being the Act of Congress approved May 17, 1884.

In its brief, Appellant contends that it has a title to tideland, including the 113 feet in question, which is tantamount to a fee therein and that by virtue thereof it may hold the tract in question by constructive possession. At one point it seems to contend that this title is derived from the Government by adverse possession under color of title, and at another, its contention seems to be that on and prior to May 17, 1884, it was in possession of one part of a larger tract of tideland, within which larger tract was included the 113 feet in question, and that because of such possession at that time, it now stands with regard to the tract in question in the situation of an owner in fee.

On the other hand, we think it clear that Appellant has not and cannot obtain a fee therein or any right or title resembling a fee and that there are but two methods by which Appellant can have any right to use or occupy tidelands in Alaska; namely: By reason (a) of actual use, occupancy, possession and claim of the particular tidelands on May 17, 1884, which actual use, occupancy, possession and claim have been continuously maintained up to the time of the alleged interruption, or (b) of being the abutting upland proprietor.

Appellee contends that the facts as shown by the evidence must lead to the following: (1) That

appellant never, at any time, *actually* used, occupied, possessed or improved the piece of tideland in controversy; (2) That even if it could be said ever to have had any kind of possession thereof, it abandoned that possession many years before Appellee entered upon the tidelands; (3) That the only right Appellant ever had in the tidelands in question was the littoral right as the abutting upland owner; (4) That Appellant by its own acts divested itself of these littoral rights.

STATEMENT OF CASE

The statement of the case, contained in Appellant's Brief, we conceive to be incorrect as to the deductions from and summary of the evidence, and therefore this statement of the case is made as we conceive it to be.

The original suit was in the nature of a bill in equity brought August 15, 1913, by Pacific Coast Company, a corporation, against George E. James and Edward Webster, in the First Division of the District Court for the Territory of Alaska, to restrain defendants from erecting certain structures on the shore of Gastineau Channel, an Arm of the North Pacific Ocean, (Rec. p. 5) IN FRONT OF THE PROPERTY OF PLAINTIFF, and particularly IN FRONT of "Blocks R, S and T, of Juneau Townsite and within the boundaries of the location "of the said M. W. Murray, made on the 6th day of "March, 1881." (Rec. pp. 1-6.) The defendant

Edward Webster filed a disclaimer (Rec. p. 7) of any interest or claim of interest and the evidence discloses that he had no interest in the controversy, but, no order was entered with reference to Webster.

The other defendant, George E. James, Appellee here, answered and filed a cross-bill (Rec. p. 9) praying (Rec. p. 17) that the Pacific Coast Company, Appellant, be enjoined from disturbing his "possession, use and occupancy" of the tract of land and from erecting piling or other structures or mooring any kind of vessel or craft, in front of or upon the property in controversy and praying further that "upon final hearing, defendant (George E. James) "be adjudged to be the owner and in possession and "entitled to the possession of said premises."

In the cross-bill it was alleged among other things (Rec. pp. 15-16):

"That prior to the commencement of this
 "action plaintiff by various certain formal
 "conveyances deeded to the Town of Juneau
 "and dedicated to said town and the public
 "as a public street, road or highway, a strip
 "off the westerly portion of Blocks R, S and
 "T, abutting on the line of mean high tide
 "and further dedicated other portions of
 "lots and blocks as public streets, roads
 "and alleys; that said conveyances and
 "dedications have been accepted by said
 "town; that by said acts the said plaintiff
 "cut off, abandoned and parted with and

“divested itself of any and all littoral and
 “riparian rights, if any it ever had, and
 “any right or privilege of access to or from
 “deep water from said upland across the
 “tidelands herein described (i. e., the
 “tidelands in controversy) and thereby
 “estopped itself from claiming any such
 “right, title or interest in or to or right of
 “access across, said herein described
 “tidelands.”

In its reply (plaintiff) Appellant (Rec. p. 20)

“admits that it deeded to the City of
 “Juneau, a certain strip of ground from
 “the westerly portion of Blocks R, S and
 “T and further admits that it conveyed
 “certain portions of said lots and blocks
 “as public streets, roads and alleys; that
 “said dedications have been accepted by
 “the Town;” The other allegations as
 to abandonment are denied.

Another allegation of the defendant's cross-bill
 (Rec. p. 16) is that before the commencement of
 the suit, plaintiff company,

“attempted to and did part with, sell and
 “convey to other persons, not parties to the
 “action any and all right, title and interest
 “in the tidelands and other lands described
 “in the complaint and cross-bill, of which
 “said plaintiff in said complaint alleges
 “itself to be the owner, and that plaintiff

“is not now and was not at the time of the
 “commencement of this action the real
 “party in interest, it having theretofore
 “parted with and divested itself of what-
 “ever right or claim of right to or interest
 “in the said property it may at any time
 “have pretended or claimed to have had
 “therein.” This allegation plaintiff denies
 in its Reply. (Rec. p. 20.)

At a preliminary hearing on an order to show cause, the Appellee, James, was left in possession of the premises, but both parties were enjoined from driving piles or erecting structures on the tidelands in controversy. The trial on the merits on July 17, 1914, resulted in a final Judgment and Decree for the Appellee, James, (Rec. pp. 34 et seq.) adjudging and decreeing him to be the owner and entitled to the possession of the tidelands in issue, and (Rec. pp. 35-36) restraining and enjoining the plaintiff, Pacific Coast Company,

“from asserting any right, title or interest
 “in or to those premises or any part
 “thereof” and “forever enjoining and
 “restraining it, the plaintiff company
 “from in any manner or form whatsoever,
 “obstructing, interfering with or hindering
 “the full and complete use, occupancy,
 “possession and enjoyment by the defend-
 “ant, George E. James, his agents, servants
 “and employees or his successors or

“assigns of the premises hereinbefore
 “described as belonging to him the said
 “George E. James, or with his or their right
 “of access, thereto and therefrom to the
 “deep and navigable waters of Gastineau
 “Channel.”

This judgment was based upon Findings of Fact and Conclusions of Law (Rec. pp. 29-34) made in conformity with the written memorandum of decision of the Court, (Rec. pp. 23-29). Appellant assigns as error (Rec. pp. 818-834) each of the five Findings of Fact and the Conclusions of Law (Rec. p. 33) and the Court's refusal to adopt its thirteen requests to find.

The subject of the suit is (Rec. p. 35)
 “a certain tract of tideland in the Town of
 “Juneau, Alaska, being 113 feet along the
 “line of mean high tide in front of lots One
 “(1) and Two (2) in Block T, and part of
 “Lot One (1) in Block S, as follows: that
 “is to say:

“The full width of Lots One (1) and
 “Two (2), Block T, being 100 feet more or
 “less, and the 13 feet of Lot One (1) in
 “Block S, which is contiguous to said 100
 “feet and extending from said line of mean
 “high tide the full width of said 113 feet
 “out to the navigable waters of Gastineau
 “Channel, an arm of the North Pacific
 “Ocean.

THE FACTS

The following is a brief, but correct statement of the facts disclosed by the record.

1. That in 1881 a notice of location was filed claiming certain tidelands and uplands together, the tract claimed being 600 feet square. (Plaintiff's Exhibit No. 1 Rec. p. 610).

2. That neither Murray nor any one representing him went into possession of the tract at the time.

3. That the Appellant, a transportation company operating a line of steamboats, in 1881 and 1882, built a wharf on the center of this tract of tideland, and that the most southerly point of the wharf, the nearest part to the ground in controversy, was over 140 feet from any point of the 113 feet in issue here. (See Testimony of Webster, Rec. pp. 66, 86, 241, 366, 377, also Wells, Rec. pp. 87-88-90-91).

4. That there were no improvements made upon this 113 feet by anyone at any time prior to 1900. (See testimony of Webster 66-86-366 et seq. George E. James, Rec. pp. 407 et seq. Sam Kohn, Rec. pp. 187-188; Chas. Biernoth, Rec. 153 et seq.)

5. That the docking of the Appellant's vessels at the wharf in the center of the 600-foot tract, and occasional mooring of a head or a stern line ashore, even if that line extended over a part of the 113 feet, to a stump or post, did not constitute a use, occupancy or possession of the tideland, but was the exercise of

the littoral right of access from deep water to the upland. (See Testimony of Edward Webster, Rec. pp. 66, 86; C. W. Wells, Rec. pp. 88, 97; J. C. Hunter, pp. 725, 727 et seq.)

6. Appellants acts in docking its vessels at this wharf did not constitute either use or occupancy or possession of the tidelands. The vessels lay in the deep water, not over the tidelands. (See Testimony of Webster, Rec. pp. 66 et seq. and 241, 366; Capt. Hunter, Rec. pp. 722 et seq.; Capt. Lloyd, Rec. pp. 116 et seq. and 784 et seq.)

7. That in 1887 Edward Webster, then wharf-inger for Appellant in charge of this wharf, drove a couple of piles near the line of high tide where the southeasterly limit of the 600 feet of tideland claimed which is practically co-incident with the southeast limit of the 113 feet, crosses the line of mean high tide and this was all that appellant ever did to improve this particular 113 feet. (See Testimony Webster, Rec. pp. 71, 72.)

8. That in 1892, Appellant built a new wharf some half mile distant and when it was completed in August, 1894, transferred its business to the new wharf, and with the exception of the docking of the S. S. Al-Ki, at the old wharf, in 1895, it was never again used as a wharf. (See Testimony Webster, Rec. pp. 76-77, 82-83; Wells, Rec. p. 94.)

9. That the old wharf was permitted to go to decay and ruin and up to August 15, 1913, had never been repaired by Appellant. (See Testimony Web-

ster, Rec. p. 82; Casey, Rec. pp. 204-5; James, Rec. pp. 407 et seq.; Ross, Rec. pp. 219-220; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. pp. 174 et seq.; W. F. Swan, Rec. pp. 264-266.)

10. That the structures on the inshore end of the approach were occasionally leased by various persons as a sardine factory, a tannery and glove factory and a tenement. (See Testimony James, Rec. pp. 407 et seq.; Webster, Rec. pp. 166 and 241 et seq.; Roberts, Rec. pp. 174 et seq.; Casey, Rec. pp. 201 et seq.)

11. That for six years, from 1894 to 1900, there was no act of any kind on the part of Appellant or any one acting under or for it, with reference to this 113 feet. (See Testimony James, Rec. pp. 407 et seq.; Webster, Rec. pp. 66, 241 and 366 et seq.; Wells, Rec. pp. 87 et seq.; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. p. 174.)

12. The tract claimed as described in Murray's location notice, was 600x600 feet, and extended from low water mark (Plaintiff's Exhibit 1, Rec. p. 610) 600 feet to inshore and upland. The same description of the tract was contained in "Parcel III" of the deed from Waterbury and Coolridge to Appellant (Plaintiff's Exhibit 17, Rec. pp. 659, 664) and also in the deed (Plaintiff's Exhibit 13, Rec. pp. 644, 647) from Thomas R. Lyons, Townsite Trustee to Waterbury and Coolridge, and yet every plat in evidence (Plaintiff's Exhibit 20, Rec. p. 768), and the plat attached to Captain Lloyd's description (Plaintiff's witness) Rec. p. 804, shows,

that the 600 feet has been moved upland and that the tract on the upland exclusive of the tidelands is now more than 600 feet on its side lines.

13. That on or about April 15, 1900, when Appellee went upon the 113 feet in question, Appellant, if it had ever had any right thereto had long before abandoned it, and it was open, unused, unimproved and unoccupied tidelands of the United States. (See Testimony James, Rec. pp. 407 et seq.; Biernoth, Rec. pp. 153 et seq.; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. pp. 174 et seq.; Ross, Rec. pp. 215 et seq.; Bach, pp. 391 et seq.; Webster, Rec. pp. —.

14. That Appellee began at once to improve the tract by clearing drift wood and boulders from it, and to use it by landing upon it rafts of lumber and to occupy and possess and claim it. (See testimony from record last cited.)

15. That Appellee continued to use, occupy, possess and claim it, as a landing place for his rafts and scows of lumber, as a place to lay up various sorts of craft and vessels for repair and winter, improving it from time to time, and in 1904, 1905, 1907, 1908, 1911 and 1912, placing substantial piling and other structures thereon which he maintained, kept in repair and continuously used in his business of a saw-mill operator, for delivering his product at Juneau. (Testimony James, Rec. pp. 407 et seq.; Biernoth, Rec. pp. 153 et seq.; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. pp. 174 et seq.; Ross, Rec. pp. 215 et seq.; Casey, Rec. pp. 201 et seq.; Webster, Rec. pp. 241,

366 et seq.; Scott, Rec. pp. 305-308; J. R. Mitchell, Rec. pp. 756 et seq.; T. A. Harper, Rec. pp. 774 et seq.)

16. That Appellant knew of his use, possession and occupancy and of the erection of his improvements thereon, during all the time from 1900 on, yet never ordered him off, never warned him of its claim of ownership or made any attempt to prevent his use, occupancy or possession or improvement thereof, until just prior to Aug. 15, 1913, when this suit was begun. (See Testimony James, Rec. pp. 407 et seq.; A. S. Dautrick, Rec. p. 355; W. F. Swan, Rec. p. 275; Ewing, Rec. p. 362.)

17. That the permission given to Mr. Messerschmidt to land cord wood over this tract was permission to exercise their littoral right only. And Messerschmidt so used it, placing his wood above the line of the June tides, i. e., the high, high tides. (See Testimony Dautrick, Rec. pp 339, 342, 355; G. H. Messerschmidt, Rec. pp. 528-530, 540-546.)

18. That the lease to Receiver Davidson was the exercise of a littoral right as disclosed by the preamble of the lease, and that use by the Receiver was not to the exclusion of nor hostile to the defendant, and was at best only casual and temporary, and the materials in the structure which were not washed away were taken down and hauled to the Perseverance Mine, in the Silver Bow Basin. (See Testimony of J. R. Mitchell, Rec. pp. 754, 762-763. See Plaintiff's Exhibit No. 22, Rec. p. 687.)

19. That no taxes were paid by Appellant on any of the 600-foot tract, the wharf site, prior to 1901, and those paid since are not evidence of use, occupancy, possession or improvement of the 113 feet in question. (See Testimony of Dautrick, Rec. pp. 356-356; Ewing, Rec. pp. 364-365.)

20. That both by admissions in its reply and by its dedication to the City of Juneau, as shown by the evidence, the strip of tidelands along and covering the line of the lots abutting on mesne high tide, as a public street, Appellant cut off its littoral rights in this 113 feet, many months before the commencement of this suit. (See Defendant's Exh. C, Rec. pp. 716-720.)

21. That by deeds and contracts of sale to Mr. Messerschmidt and Mr. Gemmett, all made prior to the commencement of this suit, Appellant divested itself of any right to maintain this suit. (See Defendant's Exh. "B," Rec. p. 713; Plaintiff's Exh. 24, 26-27, Rec. pp. 693, 699, 704.)

22. That Appellant had used the wharf twelve years and had discontinued its use for four years, a period of some sixteen years in all, when the deeds of Waterbury and Coolridge to Appellant were made. (See Testimony Webster, Wells, Hunter, James, cited above, and Plaintiff's Exhibit 17, Rec. p. 659.)

23. That Appellee will be irreparably damaged if Appellant is allowed to erect structures between his gridiron and deep water.

DISCUSSION OF FACTS.

On or about March 12, 1881, there was filed in the Harris Mining District a notice whereby one M. . Murray claimed to locate a tract of land six hundred feet square, the westerly line of which was claimed as extending 600 feet along the line of low water, and the side lines to extend inland from low water, 600 feet. The notice refers to but two corner posts and those at low water. The only monument was what was called (Rec. 610) in the copy of the notice "a blazed tree and notice and large boulder near low water line."

The minutes of a miners' meeting of Rockwell, the town now known as Juneau, held some three weeks later, contains resolutions reciting that Murray had located "outside" of the City,

"a wharf site, and proposes at earliest opportunity to build a wharf and warehouse
 "for the accommodation of vessels and
 "steamers, and for the benefit of all citizens alike. It is the sense of this meeting that we should encourage such an
 "enterprise; therefore it is hereby resolved that
 "the miners and citizens of this District and
 "City, recognizing that such improvements
 "would be a public benefit, hereby accept, en-

“dorse and recognize the rights of said Captain
 “Murray and will by our future acts endorse
 “and recognize his rights to *said wharf site* and
 “improvements.” (Rec. pp. 612-13.)

It is pointed out that the only rights Murray then could have had were by virtue of actual possession, use and occupancy, for there was then no law in Alaska with reference to the disposal of the public domain or the soils under the tide. There is no evidence that Murray or any one acting for or under him ever, either then or at any other time used, occupied or possessed this ground in controversy. At this time, all vessels calling at this port discharged upon scows or small boats as there were no wharves there.

In the fall of 1881 and 1882, a wharf was constructed at the center of the 600-foot tract by the Appellant. There is nothing in the evidence to show that Murray had anything to do with it. The in-shore end of the approach was on piling, and was about 16 feet wide and about 140 feet in length. The wharf was “T” shaped, with a face of 80 feet and a depth of 40 feet (Rec. pp. 68-69). The warehouse was on the foreshore and the center stake of the 600-foot tract claimed was directly under it. (Rec. p. 70.) Thus the wharf and warehouse were upon the center of the tract and extended only about forty (40) feet on either side of the center line. The vessels of the Appellant (which was the only transportation company whose vessels called at the port of Juneau at this time) began using this wharf at this time and

thereafter Appellant managed and used the wharf up to August, 1894, when its use as a wharf and wharf-site, for which purpose it is claimed it had been originally taken up (Rec. 610) was discontinued and Appellant transferred its wharfage business to its new structure at the foot of Main street in the Town of Juneau. But once thereafter did a vessel land at the old wharf and that was in 1895 (Rec. pp. 76-77).

It was contended by Appellant on the trial and now, that, beginning in 1882, these vessels in landing at this wharf, projected far over either end of the face of the wharf, but even if they did, the evidence is that they did not project over the 113 feet of tide land in controversy. (See Testimony of Capt. Hunter, Rec. pp. 722, 741; Webster, Rec. Rec. pp 66, 86.) It is also contended that they made fast by carrying bow and stern lines ashore and tying to piling set at the northwesterly and southeasterly lines of the property at or near the line of ordinary high water. Wells says the vessels used stumps as well as piles. (Rec. pp. 91, 98.) It is asserted by the witness Wells that the piles were put in in 1882 at his suggestion to mark the boundary of the tract and that the vessels also used them as moorings. This the Warfinger Webster denies. (Rec. pp. 71-73.) But Captain Hunter, (Rec. pp. 722-741) and Lloyd (Rec. 116, 784) said that the vessels only moored that way when the weather was bad and that such was not the practice. Neither of them testified definitely to the using of piles for mooring, but stated that the lines

were carried *ashore* and moored to any *permanent* object. Webster, who was wharfinger on the old wharf from the spring of 1885 to 1894, when it was abandoned as a wharf, says there were no such piles as testified by Mr. Wells, when he Webster went there, but that in 1887, he did drive a couple of pile at each end of the tract just at medium high water. (Rec. pp. 71-72.)

The 113 feet, which are the subject of this suit, are the most southeasterly part of the tract claimed, on the opposite side of the wharf from the town and the only improvement ever placed upon any portion of this 113 feet at any time whatever by Appellant or anyone else other than Appellee consisted of two piles. (Testimony Webster, Rec. pp. 71-72.) We think the evidence conclusive that these piles were not set until 1887, that up to that time there had been absolutely nothing done with this 113 foot piece of tide land, nor was it occupied or put to any use whatsoever, by Murray or anybody claiming under, by or through him, by Appellant or by anyone else at any time prior to, or on May 17, 1884, when Chapter 53, was adopted. Even if the vessels were moored by lines ashore as claimed, the lines were fastened above the line of high tide (See Testimony Captain Hunter, Rec. pp. 722 et seq.; Wells, Rec. pp. 91, 98), and it was merely the exercise of the right of ingress and egress between navigable waters and the upland, and even this was but

infrequently used. A vessel called during this period but about once each month. (Rec. p. 97.)

The evidence fails to establish any use, occupancy or possession of this 113 feet of tideland on or prior to May 17, 1884.

In August, 1894, the Appellant moved its wharfing business to the new wharf. But once thereafter, i. e., in 1895, did a vessel, the "Al-Ki," dock at that wharf, and then for a few hours only. There is no claim that in so doing she in any way used the 113 feet in controversy. From that time on, the wharf was allowed to go to ruin. It was put to no use whatever. The buildings on the approach were variously used as a herring (sardine) factory, a tannery and glove factory and a tenement. Nothing was done to the 113 feet of tideland in controversy. (Testimony of Roberts, Rec. p. 175; Kohn, Rec. p. 190; James, Rec. pp. 407 et seq.)

Five years from 1895 passed. During these five years neither the Appellant nor anyone else did anything to or with this 113 feet of tideland, neither used it, nor occupied it nor improved it, nor was anyone in possession of it. As the Trial Court says, in its memorandum of decision, (Rec. p. 25) "the said tidelands remained in a state of nature." So far as the 113 feet is concerned, the record is a blank. There were no taxes paid on it. There was no exercise of ownership or dominion over it. Appellant had abandoned it. (See Testimony James,

Rec. p. 407; Roberts, Rec. p. 174 et seq; Kohn, Rec. p. 187 et seq; Webster, Rec. pp. 66-86, 241, 366 et seq.

In April, 1900, this 113 feet was open, unoccupied, unimproved, and unappropriated tideland of the United States. It is true that Appellant in April, 1898, and thereafter, received certain quit claim deeds to a tract 600 feet square, but it had been moved entirely upon the upland as shown by the plats. (Appellant's Exhibit 20, Rec. p. 768, and plat attached to Lloyd's testimony, Rec. p. 804.) Appellant asserts that these deeds conveyed to Appellant the various interests which it is claimed existed in the entire property. This is incorrect, however, as alleged interest of one M. F. Griffin, of Weaverville, Trinity County, California, (Plaintiff's Exhibit 7, Rec. pp. 619-20), has never been conveyed so far as the record discloses. Among the conveyances to the Appellant's grantors was the Townsite Trustee's deed (Plaintiff's Exhibit 13, Rec. pp. 644 et seq.), which, among other tracts, purported to convey to Messrs. Waterbury and Coolridge, the tidelands in front of the upland tract. And which this Court in *McCloskey vs. Pacific Coast Company*, 160 Fed., 914, held to be void. This tract of tideland so attempted to be conveyed included the 113 feet in controversy.

The evidence fails to show any relation between Appellant and Murray or any relation between Appellant and Carroll or between Murray and Carroll, and yet it does appear from the evidence that during

all this time, Appellant, without title or other right than actual use and possession exercised acts of ownership and dominion over portions of the wharf site, but not over the 113 feet.

The record shows (Rec. pp. 136 et seq.) that Appellant's case in chief closed, with the evidence standing as above stated, with the admission in the pleading of the conveyance and dedication of that portion of upland abutting on the line of mesne high tide to the Town of Juneau as a public street, road or highway and the acceptance by the Town of the said conveyance and dedication of said strip as such public street. There was no evidence of use, occupancy, possession or improvements of any part of even the 600-foot tract, to say nothing of the tract in controversy after 1894. The only evidence of anything thereafter is, to-wit.: (that of the company's agent, Mr. Ewing) to the effect that if the company had this tract in controversy, it contemplated constructing a wharf 600 feet in length. The first deed to Appellant of the 600-foot tract or any part of, was received in April, 1898, four years after its use, occupancy and possession had been abandoned. Defendant thereupon (Rec. p. 136 et seq.) moved for a judgment of non suit. The motion was denied.

The defendant, thereupon proceeded to introduce his evidence in support of his cross-bill (Rec. p. 153), and it was confined to this; i. e., that the tideland was open, that he entered, used, occupied, and possessed it from April, 1900, to the date of this suit.

That evidence discloses that in the spring of 1900, this 113 feet of tideland was open, unappropriated, unoccupied and unimproved tidelands and while plaintiff had not then cut off its littoral rights by the dedication to the Town of Juneau, its admission of that action in its Reply eliminated that issue of littoral rights from the case. Despite this admission, however, Appellee introduced the deed of dedication and the plat (Rec. pp. 716-720). Further on, we shall direct your Honors' attention to certain evidence that shows conclusively that the only claim Appellant made or had to the tidelands in question was by virtue of its littoral rights and not under the Act of May 17, 1884.

In the spring of 1900, Appellee engaged in the sawmill business at a place then called Sheep Creek, now Thane, some four miles south of Juneau, on Gastineau Channel. One of his markets was Juneau and he rafted his lumber from the mill to town. A place where the rafts could be delivered, was necessary at Juneau, so in April (about the 15th) he and an employee named Charles Biernoth, came up with a raft for Juneau. This piece of beach or tideland was unused, unoccupied and unappropriated. It was covered with driftwood, logs and boulders and while advantageously located and generally suitable for his purpose, it was too rough to be used with safety, so he and Biernoth cleared it to make it suitable for use as a landing place for his rafts and lumber. (See testimony of Biernoth, Rec. pp. 153 et seq.; James, Rec. pp. 407-409 et seq.; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. pp. 174 et seq.; Casey, Rec. pp. 205 et

seq.; Bach, Rec. pp. 391 et seq.; Lund, Rec. pp. 226 et seq.; Ross, Rec. pp. 215 et seq.; Webster, Rec. pp. 241, 366, et seq.)

His practice was to go to the beach there with the raft at high water, moor it and wait for the ebb tide, when the lumber was hauled away by teams. From that time on until the day of the suit, Appellee, having in the meantime transferred his saw mill operations to Douglas, on the side of Gastineau Channel opposite Juneau, openly appropriated, occupied, used and improved, and held possession of this 113 feet for the purpose of a landing place for lumber for the Juneau trade. His possession was never disturbed. He was never ordered off, nor was any objection made by Appellant to his use, occupancy and improvement of this ground, though the company's agents, covering practically the whole time from 1900, each testified that he knew James was in possession of and using, and occupying the ground. The use, occupancy, possession and improvement of this tract by James during this period stands uncontradicted and unquestioned. Each year he cleared more of the rocks and boulders, making the tract more suitable for the purpose for which he was using it. Rafts and scows were beached in there regularly in the summer and in the winter, craft of Appellee were laid up there. In the spring of 1904, he drove some piles (Rec. p. 415) for the purpose of tying up scows to them. In the spring of 1905, he built a small gridiron (Rec. p. 417) on the tract, near the piles in order that the scow might lie

level. The gridiron was about 18 or 20 feet long and in bents four piles wide. (See the plat Defendant's Exhibit "A," Rec. p. 710.)

About the same time one Charles E. Davidson, the receiver of a sawmill business in Wrangell, went on this tract near where the defendant was building his gridiron, and built a platform upon set piles, for holding lumber. (Rec.. p. 420 et seq.) This platform collapsed and was rebuilt, a few piles being driven along the seaward side, but it was again wrecked by the high tides and such timber as remained was hauled to the Basin by the Perseverance Company, to be used there. (Testimony of James, Rec. pp. 465-477; Davidson, Rec. p. 576; Mitchell, Rec. pp. 754 et seq.) Appellant asserts that this action of the Receiver Davidson, constituted possession for it, as a lease was executed to him. To this lease and the so-called Davidson occupancy, we will advert later.

The Davidson platform did not interfere materially with the Appellee's use of the ground. During that summer, Appellee cleared more of the beach and opened a roadway down to his gridiron and the place where he landed his scows (Rec. p. 421). This road extended from the inshore end of the old wharf to the gridiron.

In the early spring of 1906, only Appellee's small gridiron was upon the 113-foot tract and during that season Appellee built a new gridiron and platform on it, using a part of his old gridiron (Rec. p. 423 et seq. See also Defendant's Exhibit "A," Rec. p. 710). This

was a more substantial structure than the other. In October and November, 1906, the Town of Juneau extended Franklin street, partly on upland and partly on tideland. This street has at all times since been used as a public street on past this tract. Early in the following spring Mr. James built an approach from the street down to the westerly side of his gridiron. This approach was built entirely on the 113 feet (Rec. p. 428; See Defendant's Exhibit A, Rec. p. 710), except a small "V" shaped piece which stood upon ground claimed by Appellant. This "V" shaped piece was built with the verbal permission of Mr. Swan, Appellant's agent. (James, Rec. pp. 428-429.) Appellee continued to use, occupy and possess the tract, delivering lumber there during the springs, summers and falls and laying up his scows, pile drivers and boats in the winters as he had done. In the spring of 1912 he built the easterly approach to the gridiron, most of it being on the tract. In the early summer of 1913, Appellee again began making improvements upon the tract when this suit was begun.

During all this time from 1894, on, to the date of the suit, the old wharf was put to no use whatever. In 1900 it was in ruins and a portion of it had collapsed. From time to time other portions gave way and no repairs were made. The evidence discloses but two claims made on the part of Appellant, of having put the tract in controversy to actual use, aside from the mooring lines above.

A witness for Appellant, G. H. Messerschmidt, testified that in 1900 he asked permission of the agent of Appellant to put cord wood on the beach. His testimony shows, however, (Rec. p. 530) that it was not on the beach but on the upland out of reach of the June tides (i. e., the high tide of the year). He said "it was on dry land practically" (Rec. p. 530). Thus it is seen to be the exercise of a littoral right only. It is to be observed that Messerschmidt is one of the persons to whom Appellant attempted to sell part of this tract.

The other use claimed by Appellant is that of the Receiver Davidson. An examination of the lease (Plaintiff Exhibit 22, Rec. p. 687) will show that at that time, July 1, 1905, Appellant was not claiming by virtue of possession of the tidelands under the Act of May 17, 1884, or by adverse possession under color of title. This lease is executed with all formality, by the Vice-President and Assistant Secretary under the corporate seal. These two recitals in the preamble:

"Whereas, under the permission and license
 "of the party of the first part, the party of the
 "second part, has erected a platform and pilings
"upon tidelands in front of lots one and two in
 "Block T of the townsite of Juneau, Alaska; and
 "Whereas, the said party of the first part is
"the owner of the upland upon which said tide-
"lands abutt and is entitled to the littoral rights
"thereto;"

make it clear beyond any question *that Appellant was then asserting littoral rights in the tidelands as the abutting upland owner, and not otherwise.* The exercise of this right by Davison was merely temporary and casual.

Appellant also offered evidence of the payment of taxes on the whole tract in support of its claim. There is no evidence of payment of any tax until after 1901, and no evidence as to payment of taxes on the 113-foot tract in question.

Whatever littoral or riparian right Appellant had was cut off in February, 1913, when Appellant by formal instrument under the hand of its Vice-President and Assistant Secretary and its corporate seal "*dedicated to the use of the public forever, all the streets and alleys*" (Rec. p. 717) shown on the plat (Defendant's Exhibit "C," Rec. p. 716 et seq.) for the plat discloses that *the strip of the upland abutting upon the tideland in question was conveyed and dedicated as a public street.*

APPELLANT'S ASSIGNMENTS OF ERROR.

Appellant's assignments of error go to each of the Court's five Findings of Fact and the Conclusion of Law based thereon, and to the Trial Court's refusal to adopt each of Appellant's fourteen requests for Findings and Conclusions. Appropo of these assignments, the Court's attention is directed to the Appellant's "Exceptions to Findings of Fact and Conclu-

sions of Law, etc.," which appear in Rec. pp. 836-837. There is absolutely nothing therein to call the attention of the Court or counsel to that wherein it is claimed the Court erred, nor do the assignments of error remedy the matter. Without making a more extended and elaborate reference to or discussion of Appellant's omission to more specifically point out the alleged error of the Trial Court, we respectfully submit that an exception of that character to a finding or a refusal to find, is insufficient, as a basis for a review of the evidence.

Webb vs. National Bank of the Republic, 146 Fed., 717, 719.

To enter into a discussion of each assignment of error or of Appellant's statement of what it conceives the facts to be, would extend this brief to unnecessary length in view of the fact that we have already both orally and in this brief set forth in considerable detail, what we conceive to be the facts as shown by the evidence.

APPELLANT'S BRIEF.

Nor do we think that any good or useful purpose would be served by a detailed and separate discussion of the points urged by appellant in its brief, as we are presenting in our argument, what we conceive to be the law which governs this case.

However, before leaving the subject of Appellant's Brief we do desire to point out certain features of Appellant's position as set forth in its brief which we think incorrect.

First, we have no difference with Appellant as to the correctness of the general propositions of law, quite academic in themselves, as stated in its brief, nor in the main, to the authorities cited in support of them, but we do challenge their application to tidelands and to the facts in this suit as the facts very clearly appear from the evidence.

Again: It is pointed out that Appellant in its primary statement in its brief (pp.8-9) of what it claims the law of the case to be, *abandons its original position* that it was a successor in interest of the 1884 possessor and now *concedes that whatever use, occupancy, possession or claim* there was of the so-called Carroll-Murray Wharf site, including the tract in controversy *was that of appellant alone.*

Again: Appellant *concedes* (Brief, pp. 8-9)

that there was a difference in the use, occupancy and claim made by it during the period from 1881 to 1894, and that from 1894 to the commencement of the suit. In other words Appellant in its Brief asserts (1) That from 1881 to 1894, it used, occupied and claimed under color and claim of title the *whole* of the wharf site, including the tidelands in controversy and (2) that from 1894 to August 13, 1913, it used, occupied and claimed under color of title the *greater part* of the wharf site. It is obvious therefrom that Appellant tacitly admits that at least from 1894 on, it had no possession of the 113 feet in question unless it can in law be deemed to have had a constructive possession by virtue of what (say for the purpose of argument only) was its possession on May 17, 1884. This of itself is a concession of at least one phase of Appellee's contention, to-wit.: that on April 15, 1900, when Appellee went upon the 113 feet in question, Appellant was not and had not been for many years, at least from 1894, in the actual possession of that portion of the tideland in question. We think that as shown by Appellee's authorities and argument hereinafter presented, if Appellant was not in actual possession, it could not hold the tidelands under constructive possession, for tidelands in the Territory of Alaska are not susceptible of any such holding.

Again: Appellant seems to find great satisfaction in the assertion that Appellee does not claim to have acquired title to the 113 feet by adverse posses-

sion. It seems to us that the reasons why Appellee does not claim title by adverse possession are quite obvious in the light of the evidence. Any claim of title by adverse possession would rest upon an admission (1) that Appellant was once, at least, in possession, entitled to possession and that Appellant was the "true owner" of the 113 feet. None of these propositions do we admit. On the contrary, we deny them in toto and we think that there is no basis in fact as shown by the evidence or in law, for any one of them. Appellee's position is that no one had ever been in possession of this tract and that when he entered it in April, 1900, it was open, unappropriated, unoccupied and unused tidelands; (2) That title to tidelands may be acquired by adverse possession under color of title. We maintain that this is not the law. A discussion of our position thereon will be found later.

Appellee does not claim by virtue of a title to the tideland *BUT* by virtue of *ACTUAL PHYSICAL, APPROPRIATION, USE, OCCUPANCY, POSSESSION* and *PERMANENT IMPROVEMENT* of the 113-foot tract.

That Appellee had that actual physical possession and had had it for many years prior to the commencement of this suit on August 15, 1913, is a conceded fact in the suit. The period only is in controversy. The evidence (See Testimony James, Rec. pp. 407 et seq., and other already cited) shows that Appellee went into the actual physical possession in April, 1900, and has continued in

possession down to the date of the suit. Appellant claims two interruptions in this possession (but not in use) one by Messerschmidt and one by Davidson. Each of these we have already considered sufficiently in our discussion of the evidence. Whatever this Court may conclude as to those two instances, it is undisputed, in fact conceded, that regardless of his use, occupancy and possession prior to the fall of 1905, he has since that time been in the *exclusive, undisturbed, actual, physical, use, occupancy and possession* of the entire ground. However we assert that the evidence discloses Appellee's use, occupancy, possession and improvement of the tidelands during the entire period from April, 1900.

Again: The Court's attention is directed to Appellant's statement contained in the last five lines of the second paragraph of page 15 of the Brief, of what it asserts to be the substance of this Court's construction of Sec. 8, Chap. 53, Act of May 17, 1884. This general proposition we discuss hereafter but point it out here as one of the misstatements of the law.

The statement contained in par. 2, of p. 27 of the Brief is on a par for inaccuracy with that on page 15. The statement that until patent has issued the statute of limitations in Alaska, does not commence to run, is of course, correct as a general proposition, but it has no applicability here, for no patent has or will issue to tidelands while Alaska remains a Territory. In this connection, it is again pointed out that Appellee claims not under color of title, but by virtue of

actual use, occupancy and possession, which as heretofore stated it is conceded to have had.

Again: Appellant throughout its entire Brief overlooks the distinction between *public lands* of the United States which are subject to purchase, sale, and patent, and *tidelands* in Territories, which are not subject to purchase, sale and patent. The rules of law applicable to the former, Appellant invariably seeks to apply to tidelands. The great majority of citations in Appellant's Brief, in fact practically all outside of the citations to decisions of this Court are to cases which involve uplands with no reference to tideland holdings at all.

Again: We challenge the inference sought to be presented from the assertion in par. 2, of page 24, of the Brief, that "the testimony is uncontradicted and "the Court decided, that Appellant and its grantors, "used, occupied and claimed the whole wharf site "during the period from 1881 to 1894." In the first place, the evidence does not show nor did the Court decide that "Appellant and its grantors used, etc., "the whole wharf site". There is no evidence that any person, company or corporation aside from Appellant ever used or occupied or claimed to use or occupy the *whole* wharf site. And the Trial Court in its written Memo of Decision stated (Rec. pp. 23-24) :

"There is no evidence that Murray built the "wharf or had anything to do with its building "or that any consent from Murray was obtained.

“In fact, Murray seems to have vanished for several years, and it was only in 1898, that plaintiff acquired whatever right Murray had, “if indeed he had any.”

“Certain it is, however, that in 1882, the Plaintiff went into the use and occupation of the wharf and in the absence of any evidence to the contrary it must be presumed that *Plaintiff* owned said wharf and used and occupied, “that is possessed it, in its own right.”

As to the use of the whole wharf site, the only evidence is that vessels lying at the wharf shifted along the face of the wharf, according as they discharged from the “forward” or “after hatch,” and that in stormy weather, were sometimes moored by bow or stern lines ashore. And the line was carried sometimes by boat over the tidelands in question sometimes along the shore, to the object to which it was made fast. (See testimony of Wells, Rec. pp. 91-94; Hunter, Rec. pp. 722 et seq., and others already cited).

The Trial Court, referring in its decision to this matter, said (Rec. p. 24) :

“Whether these lines were fastened to stumps “or boulders on the shore, or to a pile at LOW “water (the word ‘low’ is evidently a mistake as “there was no evidence of a pile at low water; “there was some evidence that a pile was driven “as near high water as the pile driver could get) “the evidence is not very satisfactory, but I

“think it is clear that a space of at least 250 to 300 feet on each side of the center line of the wharf was a necessary adjunct to the use and enjoyment of the wharf as a landing place for such vessels as were operated by the plaintiff.”

It is respectfully pointed out that this language of the Trial Court is not susceptible of any such claim as that made by Appellant. We think that this use was as the Court said, “*as a landing place*” for vessels, i. e., it was the *deep water of the channel* that was necessary, *not the tidelands* and the Appellant may have had the *right of access* from deep water to its upland.

Again: It is clear that “such use, occupation and claim” from 1881 to 1894 was *NOT* maintained under any color of title since the first deed purporting to convey this tract that passed to Appellant was dated and executed in 1898 (i. e., Plaintiff’s Exhibit No. 17, Rec. pp. 659) four years after as the Trial Court finds (Rec. pp. 25-28) the Appellant had abandoned all of the tideland in controversy.

Again: We challenge the correctness of the statement (Brief, last sentence par. 1, p. 26) that “the whole of the premises in dispute were exclusively occupied by Appellant’s tenant without let or hindrance from Appellee.” An examination of the evidence of James (Rec. pp. 407 et seq.) ; Davidson, (Rec. pp. 576 et seq.) ; Mitchell, (Rec. pp. 754 et seq.) ; Harper, (Rec. pp. 774 et seq.), and others, will disclose that this is not a correct statement but that

Davidson's activities did not exclude James from the tract and that James used the tract during all the time that the Davidson platform was there.

We have thus pointed out some of what we conceive to be incorrect statements of fact and law set forth in Appellant's Brief. The general propositions of law which we believe to be decisive of this suit we have stated in the following pages and in discussing these we shall have occasion to refer again to Appellant's contentions.

Before we close this discussion we desire to repeat that as we understand the law and the evidence in this suit, the crucial and decisive question is in the interpretation of the language of Sec. 8, Chap. 53 (23 Stat. L., 26) known as the Act of May 17, 1884, as to what sort and character of original possession of tidelands is protected thereby and what sort of subsequent possession will entitle a claimant to successfully invoke the protection of the statute.

Appellant's position seems to us to be,

(1) That it was in possession of the entire 600 feet, the 113 feet in controversy being held not by possession, use or occupancy of itself, but by virtue of the use of other and different parts of the tract on May 17, 1884.

(2) That this constructive possession at that time gives Appellant by virtue of the statute a title which is tantamount to a fee in the whole tract of tidelands and entitled it to constructive possession, though, it ceased to actually use, occupy or possess it.

(3) That aside from the title acquired as above, it has, by virtue of an occupancy and use of part of this tract, under a claim of color of title, acquired a title (again tantamount to a fee) by adverse possession.

In this connection it is respectfully pointed out that Appellant, though the evidence shows it alone to have been in possession of the wharf on May 17, 1884, (in fact from 1882 to 1894) now claims to hold by virtue of a series of deeds from persons, who are in no way, or manner, shown by the evidence to have ever gone upon, used, occupied or possessed either the whole or any part of the wharfsite, not to mention the 113 feet in question. In other words, while appellant appears by the evidence to have been the sole user, occupant and possessor and claimant of the wharf, it also seems to be attempting to build up a paper title to a larger tract from persons, who are not in any way shown to have had any connection whatever with the land in controversy. We believe all three contentions to be fallacious.

However it seems clear that the true rule is that tidelands in Alaska may be held *only*,

(a) By virtue of having on May 17, 1884, been in actual use, occupancy and possession of the claimant, such actual use, occupancy and possession having since been actually maintained either by the original user or by the tacking of subsequent uses.

(b) By virtue of an easement resting in the proprietor and owner of the abutting uplands.

(c) By actual use, occupancy, improvement and possession, established at any time and maintained.

These propositions we think abundantly sustained by the authorities. Thus if Appellant was the original user on May 17, 1884, it abandoned that right right in 1894, and proceeded on the theory (as shown by the evidence) that as the proprietor of the abutting upland, it had an easement over the fore-shore. But of this right, Appellant prior to beginning the suit, divested itself by a conveyance and dedication to the city as a public street of a strip of upland abutting on the tidelands in controversy.

In support of these propositions we now respectfully direct the Court's attention to our points, authorities and argument, as follows:

POINTS.

I.

There can be no fee in the tidelands in the Territory of Alaska, and Chapter 53, Sec. 8, 23 State. L. 26, (C. L. A. 1913, p. 144) being the Act of Congress approved May 17, 1884, though applicable to tidelands, as well as public lands in Alaska, does not change or modify this rule, but its purpose and effect is merely to protect "Indians or other persons" from being disturbed "in the possession" of any lands actually in their use or occupation or now (i. e., May 17, 1884) claimed by them.

II.

The possession of tidelands which is protected by the Act of May 17, 1884, (Chap. 53, Sec. 8, 23 Stat. L. 26) is the original actual possession on that date which has since been actually and continuously maintained by the original 1884 occupant or by him and his successors down to the moment of the controversy. Constructive possession will not satisfy the requirement of the statute.

III.

The acts of Appellant or of Appellant and its predecessors if any it ever had, on May 17, 1884, or at all, insofar as the 113 feet herein controversy are concerned, did not constitute actual use, occupancy and possession of the tidelands within the requirement of the statute.

IV.

.. Title to **TIDELANDS IN ALASKA**, may not be acquired by adverse possession under color of title, as

(a) Title to the tidelands is in and held by the United States, in trust for the future State and the United States will not dispose thereof, except for appropriate purposes, such as for the confirmation of a grant by the ceding nation, or in the performance of an international duty or in case of some public exigency.

(b) Title by adverse possession ripens into a fee and consequently, title can be so acquired only in lands of the United States which are susceptible of being sold and patented; i. e., in public lands of the United States;

(c) Tidelands in Alaska are not public lands and may not be sold nor fee in them passed except as specified in subd. (a) hereof; therefore no possession of tidelands in Alaska can ripen into a fee against the United States or the future state.

(d) Before a person's possession of a given tract of land can be deemed to be adverse, so that the maintenance of that possession for the period prescribed in the statute of limitations, will ripen into a fee, there must be another and an original and resisting possession of the identical tract by another person claiming to be the "true owner", to which the new claimants possession is opposed, that is to say, adverse. The "true owner" of the tidelands in question has always been the United States; therefore Appellant never could have acquired, nor did it acquire a fee by any occupancy or possession by itself or its predecessors, if any.

(e) There can be no color or claim of title to tidelands in Alaska, inasmuch as the title thereto is in the United States; the rule as to color and claim

of title being applicable only to lands to which fee title may be acquired and which are subject to be held by prescription. A notice of location of tidelands is not color of title.

(f) The deed of the Townsite Trustee, purporting to convey to appellant and its grantors, title to soil in Alaska covered and uncovered by the flow of the tide, i. e., a large tract of tidelands including that piece in controversy, was ineffective as to tidelands, as Appellant "could thereby take nothing below the "high tideline for the 'government had not parted "with its title. "

V.

Possession of tidelands being susceptible of transfer may also be abandoned.. The acts of Appellant constitute abandonment.

VI.

Tidelands which are open, unappropriated, unused, unoccupied and unimproved may be appropriated, used, occupied, possessed and improved, by any person, subject always, (1) to the control of the United States, under its constitutional rights to protect and regulate commerce and navigation; (2) to the dominion, sovereignty and ownership of the future state; and (3) to any existing littoral right.

VII.

Appellant having abandoned any possession of this 113 feet which it ever had, could have no other rights therein or thereover, that were incident to its ownership, if it was the owner, of the abutting upland, that is to say; the littoral right or right of access to and from the deep and navigable waters of Gastineau Channel; but this is not a title to the soil below high water mark. It is merely and only an easement.

VIII.

An owner of upland abutting upon navigable waters, may convey away and divest himself of his littoral and riparian rights; and appellant's deed and dedication of a strip of upland abutting on the line of mesne high tide along the 113 feet of tidelands in controversy, without reservation and forever, to the City of Juneau, as a public street, divested appellant of all its littoral and riparian rights and easement of access between the upland and the deep and navigable water across the tideland in controversy.

IX.

Appellant having thus abandoned whatever possession of the tidelands in question it may have had, if any, and having divested itself of its littoral

and riparian rights across the foreshore, is without any right to bring this suit.

X.

Even if Appellant had had any other right or interest in these tidelands in controversy, which might have been the subject of this suit, Appellant was not the real party in interest, nor the proper party to bring this suit, as prior to August 15, 1913, it had executed deeds and conveyances and contracts for deeds and conveyances of the foreshore in controversy.

ARGUMENT.

POINT I.

There can be no fee in the tidelands in the Territory of Alaska; and Chapter 53, Sec. 8, 23 Stat. L. 26, (C. L. A. 1913, p. 144) being the Act of Congress approved May 17, 1884, though applicable to tidelands as well as "public lands" in Alaska, does not change, or modify this rule, but its purpose and effect is merely to protect "Indians or other persons from being disturbed in the possession" of any lands **ACTUALLY** in their use or "now" (i. e. May 17, 1884) claimed by them.

Appellant has in this case, based all its argument, in fact its case, upon the theory that the same rules of law apply to tidelands as to the upland. We thinks the

true rule entirely to the contrary. The Supreme Court of the United States in *Mann vs. Tacoma Land Co.* 153 U. S. 273 (38 L. Ed. 714) says that

“land alternately covered and between the dry
“upland and the navigable water is land which
“may be used in facilitating approach to navig-
“able waters from the uplands and is strictly
“within the description of “tideland.”

8 Enc. of U. S. Sup. Ct. Reports 812,

Baer vs. Moran Bros. Co. 153 U. S. 287-288,
38 L. Ed. 718.

Walker vs. Harbor Com. 87 Wall. 648, 21 L.
Ed. 744.

The tract in controversy in this case is tideland and for that reason has special value to Appellee since it is desirable for use in facilitating approach from navigable water to the upland.

Tidelands and title thereto have long been the subject of consideration by the Courts of England and this country. And so far as the doctrine of title to tidelands in Territories of the United States is concerned, it was settled by the U. S. Supreme Court in *Shively vs. Bowlby*, 152, U. S. 1, 49 and 50, where the Court said:

“The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, *above* high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but

that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purpose of commerce, navigation and fishery, and for the improvements necessary to secure and promote these purposes, shall not be granted away during the period of territorial government; but unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The fact that the Territory of Alaska was acquired by the United States by treaty from Russia does not change the situation for "every nation acquiring "territory by treaty or otherwise, must hold it, subject to the Constitution and Laws of its own "Government."

Pollard vs. Hagan, 3 How. 212, 225.

And "the title and dominion passed to the "United States for the benefit of the whole peo-

“ple, and in trust for the several states to be
“ultimately created out of the Territory.”

Shively vs. Bowlby 152, U. S. 1, 57.

The Supreme Court in the case of *Pollard vs. Hagan* cited above and decided in 1845, then laid down the following as the law of tidelands:

First: “The shores of navigable water and
“the soil under them were not granted by the
“Constitution to the United States, but were re-
“served to the States respectively.”

Second: “The new states have the same
“rights, sovereignty and jurisdiction over this
“subject as the original states.”

Third: “The rights of the United States to
“the public lands and the power of Congress to
“make all needful rules and regulations for the
“sale and disposition thereof, conferred no
“power to grant to the plaintiffs the land in
“controversy in this case.”

This pronouncement of the Supreme Court stood unchanged when Congress passed the Act of Congress, Chap 53, 23 Stat. L. 26 approved on May 17, 1884. So that while Congress in that Act provided,

“That the Indians or other persons in said
“district shall not be disturbed in the possession
“of *ANY LANDS* actually in their use or occu-
“pation or now claimed by them, but the terms
“under which such persons *MAY ACQUIRE*
“*TITLE TO SUCH LANDS IS RESERVED*
“*FOR FUTURE LEGISLATION BY CON-*

“*GRESS.*” (Chap. 53, Sec. 8, 23 Stat. 26).

It cannot reasonably be said that Congress intended thereby to provide a method of granting or issuing *A TITLE* to such tidelands as might then be in the use or occupancy and possession of Indians or other persons. In support of that contention, it is respectfully pointed out, that Congress in that section made provision for a land office and a method of acquiring title to mines and mineral lands and lands held as mission stations, but therein specified that

“nothing contained in this Act shall be construed
“to put in force in said District the general land
“laws of the United States.”

In other words, Congress said, we are permitting you who are now actually upon any kind of land in the Territory, to continue undisturbed in your actual use and possession of it. You may not now acquire title to it, but some day we will make the *GENERAL LAND LAWS* of the United States applicable to the Territory. As has been frequently pointed out by this Court, there is a very clear distinction between Public Lands and tidelands.

Public Lands or public domain are such lands of the United States as are subject to sale or other disposal under general laws and are not held back or reserved for any special governmental or public purpose. (32 Cyc. 775).. They are lands which the United States owns and of which as such owner, the United States may make disposition when and as to it seems desirable, without any thought of the future

state. Obviously, tidelands in the Territory do not fall within this classification for they are not so held nor so to be disposed.

Shively vs. Bowlby, supra.

Thus if Congress had intended to protect the possession of *public lands* only, it would have used that term instead of the broader term "*any lands.*"

Heckman vs. Sutter 119 Fed. 83,88.

But it is respectfully submitted (and we do not understand this or any other Court to have held to the contrary) that an interpretation of this statute to the effect that Congress intended to and did thereby place tidelands on an equality with public lands would be not only to reverse the whole trend of judicial decision up to that time but also what seems now to be the settled law of tidelands as announced by the Supreme Court in the case of *Shively vs. Bowlby, supra*. This latter case, while it discusses the decision in *Hagan vs. Pollard* and explains it, modifies it but slightly. The language of the Court in this respect is as follows:

"The United States while they hold the coun-
 "try as a Territory, having all the powers both
 "of national and of municipal government, may
 "grant, *for appropriate purposes*, titles or
 "rights in the soil below high water
 "mark of the tide waters. But they have never
 "done so by general laws; and, unless in some
 "case of international duty or public exigency,
 "have acted upon the policy most in accordance

“with the interest of the people and with the
 “object for which the Territories were acquired,
 “of leaving the administration and disposition of
 “the sovereign rights in navigable waters, and
 “in the soil under them, to the control of the
 “states, respectively, when organized and admitted into the Union.”

The “appropriate purpose” which the Court had in mind as those for which titles or rights might be granted, were, as was said by the Supreme Court in the same paragraph, “the case on an international duty,” (obviously, the confirming of a grant by the ceding nation), or “public exigency,” that is to say, some purpose for the benefit of the general public. But the act under consideration contemplates neither “an international duty or a public exigency.” It seems clear that Congress did not thereby intend to change the rule that there can be no fee in tidelands in a Territory or to provide for the inception of a title to tideland from the United States. What was intended by Congress was to protect Indians or other persons then in actual use, occupancy or possession from having that use, occupancy or possession disturbed, in order that when the State should ultimately be formed, the original actual possession, maintained however until statehood, might be dealt with by the state itself, following its course in other Territories and states.

8 Encyc. of U. S. Supt. Ct. Rpts. 813,
Shively vs. Bowlby, supra,

Pollard vs. Hagan, supra,
Martin vs. Waddell, 16 Pet. 367,
Mann vs. Tacoma Land Co., supra,
Webber vs. Harbor Br. of Comm. 18 Wall 57,
 21 L. Ed. 789.
Hardin vs. Jordan, 140 U. S. 371, 35 L. Ed.
 428,
Columbia Canning Co. vs. Hampton, 161 Fed.
 60.
McCloskey vs. Pac. Coast Co. 160 Fed. 794,
Sutter vs. Heckman, 119 Fed. 88, 128 Fed.
 393,
Carroll vs. Price, 81 Fed. 137.

POINT II.

The possession of tidelands which is protected by the Act of May 17, 1884, (Chap. 53, Sec. 8, 23 Stat. L. 26) is the original actual possession on that date, which has since been actually and continuously maintained by the original 1884 user, occupant, and possessor or by him and his successors in that actual use, occupancy and possession, down to the moment of the controversy. Constructive possession will not satisfy the requirement of the Statute.

The language of the statute itself, already quoted seems perfectly clear, that it is the actual use, occupancy and possession that is protected. Nor indeed do we understand that this or any other Court

has held any other use, occupancy or possession to be sufficient to enable a claimant to invoke the protection of the statute. The statute says that "Indians or "other persons * * * shall not be disturbed *IN THE "POSSESSION* of any lands *ACTUALLY* "in their use or occupancy or now claimed by them * * *."

That is to say: That any person who is now (i. e. when the act became a law) really, actually (not constructively) using, occupying and claiming tidelands may continue to use and occupy such tidelands undisturbed so long as he actually uses, occupies and possesses, these lands. The Trial Court arrived at this conclusion and placed upon the section the reasonable and logical and (if the Act is to be effectual) the correct construction, concluding that the word "or" before the words "now claimed," should be read "and" thus following the District Court in *Sutter vs. Heckman*, 1 Alaska 199-200, and further that the use and occupancy that warranted protection was actual, continued and maintained use and occupancy.

The District Court of Alaska in *Carroll vs. Price* 81 Fed. 137, 139, says:

"Under this provision (i. e. the statute quoted) all persons *who are in the actual use* and "occupancy of tracts of public land in this District * * * are protected against intrusion, "and their possession cannot be disturbed."

In case of *Heckman vs. Sutter*, 119 Fed. 83, 88, this Court Said:

“That legislation (act referred to) was sufficient authority, in our opinion for the decree of the Court below securing the complainants *“in the use and possession of land which the evidence shows and the Court found was held and maintained at the time of their disturbance therein by the defendants and for years theretofore had so held and maintained.”*

The possession there was actual at the time of the commencement of the suit and it was for that reason that complainants were protected.

On a rehearing of the same case reported in 128 Fed. 393, 397, this Court in discussing the requisite character of use, occupancy or possession said:

“When, as in the case in hand, the reasonable exercise of it (the right of fishery) required the clearing and use of a small portion of tide-lands, there seems to be nothing even unjust in protecting such possession against the invasion of a rival in the business. Nor does such temporary concession of such right of occupancy in any way involve a concession of any title to such tidelands, or *any permanent right of possession.*”

Because the complainant in that case was in the actual possession when disturbed, he was protected therein, but the Court was particular to specify it was not to be deemed to hold that the complainant was thereby entitled to a title therein or permanent possession thereof. It seems clear that the Court

meant that the right to protection would be lost by cessation of that actual use or possession.

This Court again in *McCloskey vs. Pacific Coast Co.*, 160 Fed. 794, protected the actual occupancy and possession of the Pacific Coast Co., which had been maintained. There the company performed acts of dominion and ownership with reference to the particular tract of tideland in litigation and used it, drove piling on and around it and placed a log boom about it, excluded people and boats therefrom and otherwise used it and acted during a long period of time in such a manner as to indicate that it was the actual occupant and possessor of the tract at and prior to the time of the interference therewith by McCloskey.

Thus we think it to have been settled by this Court in these and other cases that it is the actual use, occupancy and possession of tidelands in Alaska, continuously maintained from May 17, 1884, to the time of the interference, and that character of use, occupancy and possession only, that will be protected under this statute, and that constructive possession does not satisfy the statute.

POINT III.

The acts of Appellant or of Appellant and its predecessors if any it ever had, on May 17, 1884, or at all, so far as the 113 feet in controversy here are concerned, did not prior to constitute actual possession of the tidelands within the requirements of the statute.

In discussing this point, the claims of Appellant will first be enumerated and what we believe to be the extent of the legal effect and force of those acts, will be considered.

(a) As to appellant's acts:

Appellant's *first* claim as a basis for the claim of possession of this 113 feet, is that Murray located the tract of ground 600 feet square including this ground in question. There is no evidence that Murray ever entered upon the ground. The evidence does show, however, as already pointed out that the 600 feet originally claimed to have been located by Murray, extending inland from the low water mark, has been by Appellant moved upland, its seaward line now being above the line of mesne high tide, and it now claims, 600 feet on the upland under the original location and deeds. It would seem from this that Appellant must be considered to have abandoned its claim of possession of the tideland under that original location, since it moves its upland holdings further inland and take the 600 feet entirely upon upland instead of a part upon the foreshore.

Second: . . Appellant claims to have built a wharf upon the tidelands. As already pointed out, this wharf was built by Appellant itself, in the center of the 600 feet tract. Its face was only 80 feet wide, of the 600 foot tract. Its face was only 80 feet wide, of this wharf or approach covered or came within many feet of any part the land in controversy. This

use of this wharf was abandoned and it was allowed to go to ruin and decay. Portions of it collapsed and it was never repaired.

Third: Appellant claims to have driven a couple of piles on the land in question. One of the witnesses testifies that it was driven before 1884, yet the evidence of Webster the man who drove it, shows it to have been driven in 1887 subsequent to the approval of the statute in question, as high upon the shore as the piledriver could go. This is the only improvement or actual occupancy of the ground in question on the part of the Appellant or any one else until Appellant improved it.

Fourth: Appellant claims that the vessels moored at the wharf sometimes projected across the front of this tract of tide land. It is, however, to be borne in mind that while these vessels may have projected *across a portion of the front* of the tract in controversy, the evidence discloses that *none of them lay upon or over the tract itself* inasmuch as they were moored *in deep water at the face* of the wharf and the mooring of a vessel at a wharf in that way does not constitute a use of the tidelands between deep water where it is moored, and the upland abutting thereon.

Fifth: Appellant claims that lines were sometimes during stormy weather carried ashore from a vessel and made fast to some permanent object on the upland. It will be seen that this does not constitute occupancy of the tract, but constitutes the exercise of a littoral right.

Sixth: Appellant claims to have permitted one Messerschmidt to have landed cord wood here, but it is submitted that the evidence shows that the wood was landed upon the upland and that Messerschmidt came to the tract from deep water, passed over the tideland and landed the wood on upland above meane high tide out of the reach of the June tides.

Seventh: Appellant claims that a lease was given to one Davidson to use a part of this tract and that Davidson did use it. It is respectfully pointed out to the Court that this lease itself (See Plaintiff's Exhibit 22, Rec. pp 687) recites not the ownership of the tidelands but the ownership of the uplands and the lease is given in the exercise of the littoral right of the upland owner which may have existed at the time the lease was given, but this does not constitute use or occupancy of land under the Act of May 17, 1884.

Eighth: Appellant claims to have paid taxes upon the larger tract, but there is no evidence that taxes were paid on this particular piece of ground.

Ninth: Appellant claims that the sale of lots by Appellant was the exercise of dominion.

(b) As to effect and force of acts claimed to have been performed by Appellant.

It will be at once noticed that these are really disconnected and isolated acts, all of which with one or two exceptions, were performed with reference to or upon the larger tract and at a point or points far

removed from the 113 feet in question. The law requires something more than isolated, disconnected, sporadic acts to constitute any kind of use or possession, not to speak of actual use and possession.

“Actual possession of land consists of exercising acts of dominion over it, in making the ordinary use of it and in taking the profit of which it is susceptible.”

1 Cyc. 983.

These acts do not measure up to this gauge.

The recording of a notice, of itself does not constitute actual possession though when taken with other *sufficient* acts it might be evidence of *intention* to use. However, *Appellant did not file* the notice and there is no evidence that Murray ever went into possession of the tract himself or by anyone acting for him, or that the possession by Appellant of the wharf was under or pursuant to that notice or any arrangement with Murry. The Circuit Court of the District of Colorado in the case of *Latta vs. Clifford*, reported in 47 Fed. 614 at page 619, says:

“If he (claimant) asserts the right of ownership over the property, if he does that with reference to property of the kind to which men usually do with their own property of a like nature, such as improving it, or using it for any purposes, that is possession. The control, management and direction that he may take with reference to the property, although he has

“never been on it, where it is under his control, management and direction, may be sufficient to establish possession. It may be established by enclosure, by cultivation, by the erection of buildings or other improvement, or in fact by any use that clearly indicates its appropriation and actual use by the person claiming to hold it.”

This suit involved the upland. But even assuming for the purpose of the argument only, that it is applicable to tideland, certainly there is nothing in Murray's action which falls within this definition. The driving of a couple of piles together on a boundary can be neither enclosure, cultivation, nor an improvement, nor is it a use of the tract. The docking of vessels in deep water or the carrying of mooring lines to the upland there to be temporarily made fast, even once or twice a month, can scarcely be said to constitute a user of tide lands. Neither the piling of cord wood on the upland by Messerschmidt, nor the construction of the Davidson platform after the Appellee had gone into the possession of the property, was a user or an improvement in the sense used here, or at all, but was merely a temporary exercise of the littoral right.

In the case of *Delancy vs. Piepgrass* 33 N. E. (N. Y.) 822, 827, Appellant's grantor went into possession of upland bordering 100 feet on shore, using the upland as a shipyard, built two structures, a wharf and a marine railway which were allowed

to decay, and he also procured from the Land Commission of the state, a patent for something over two acres under water on which the railway stood. No other structures were erected for twenty years on this tract. Commenting on this state of facts, the Court said:

“In any event, it is evident that there was no
 “permanent appropriation of the soil by Carll,
 “that is, Appellant’s grantors. The structures
 “were of a temporary character and designed
 “simply to afford a means of access between the
 “upland and the navigable water of the Sound
 “and a title in fee will never be implied from a
 “user where an easement only will secure the
 “privilege enjoyed.”

The above case seems to be analagous to the case at bar, inasmuch as while Appellant itself never used the particular piece of tideland, it claims to hold it by virtue of its original construction and use of a wharf prior to 1884, which was abandoned in 1894, and allowed to go into ruin and decay as shown by the evidence, the business of the company being transferred to another wharf in a different part of the town of Juneau. Certainly it would seem that Appellant’s acts or rather failure to act cannot reasonably be said to constitute actual use or possession of the tract in controversy, nor does it constitute the maintenance of any such possession. In the case at bar the littoral right secured to Appellant the privileges enjoyed. The acts in the exercise of that privi-

lege ought not to be construed as something different or more permanent.

Seabrook vs. Coos Bay Ice Co., an Oregon case, (89 Pac. 417), while dealing with the subject of adverse possession is in point here as defining the character of the possession and improvements necessary to constitute actual possession. The Court says:

“The only proof is the testimony of Patrick Hennessey, Superintendent of the Oregon Coal & Navigation Co., the defendant’s grantor, and he says: The Company had possession of some tideland there; about all I did was to pay taxes on it. There were no buildings on it. Some piling. We received rent money for scows and a piledriver which tied up there two or three years ago. These house boats were used as dwellings. I don’t know where the piles were driven as it was a long time ago. It is more than ten years since they were driven. The house boats were not there continuously. Once in a while they tied up there during this period. The pilings were not connected with each other in any way. This evidence does not tend to establish adverse possession. (Citing *Montgomery vs. Shaver*, 40 Ore. 221, 66 Pac. 823.) Actual occupancy, *pedis possessio*, is necessary to constitute such possession as will ripen into title.”

The facts in that case are not so different from those of the case at bar, for here a pile was driven

and an occasional line taken over the tidelands to the upland. As a matter of fact, it would seem that in the Seabrook case the facts were stronger for the original claimants of the land than they are for appellant here.

In the case cited there, *Montgomery vs. Shaver*, 66 Pac. 923, p. 925, the Oregon Court addressing itself as to what did not constitute actual possession, said:

“As it relates to the remaining space, the defendants drove some piling there in extending out to the old wharf line early in 1882, but have done nothing further in the way of completing the structures to the present time. (i. e., 1901). Part of the space was once used as a ferry slip upon the authority of the defendants for about six months and boats have occasionally tied up to the piling, but otherwise there has been no occupancy or use by defendants. *This comes far short* of use to exclusive or adverse possession.”

This was another case with facts somewhat analogous, in which the Court found that the driving of piling and the occasional use of the tract did not constitute actual or exclusive possession.

The author of the article on “Adverse Possession” in 1 Cyc. says at p. 984 et seq.

“It is ordinarily sufficient, if the acts of ownership are of such a nature as a party would exercise over his own property and

“would not exercise over anothers. Actuality of
 “possession is a question compounded of law
 “and fact and its solution must necessarily de-
 “pend upon the situation of the parties, the na-
 “ture of claimant’s title, the character of the
 “land and the purpose to which it is adapted
 “and for which it has been used. All the cir-
 “cumstances must be taken into consideration.
 “The only rule of general applicability is that
 “the acts relied upon to establish *possession must*
 “always be as distinct as the character of the
 “land reasonably admits of and must be exer-
 “cised with sufficient continuity to acquaint the
 “owner, should he visit the land, with a view that
 “a claim of ownership adverse to his title is be-
 “ing asserted.”

This too, of course, refers to the subject of ad-
 verse possession, but at the same time, it states the
 well considered rule as to what constitutes actual
 possession, whether in an adverse suit or otherwise
 and seems to be quite as applicable here. In the case
 at bar, Appellant had no title whatever, but if ever
 there, on the 113 feet in question, was there *merely* by
 virtue of its actual occupation. The fact that Murry
 may have filed a notice and that any right which he,
 Murry might have had was conveyed to Appellant
 by a series of quitclaim deeds, long years afterward
 and after practically all the transactions in this case
 had occurred, does not give Appellant title. The

circumstances are, as shown by the evidence and, as admitted by statement of counsel on the argument in this court, (we do not attempt to quote his exact language) that Appellant had no use for this ground for the time, that is, after 1894 and therefore paid no attention to it and put it to no use whatever. In other words, the ground was never used for any purpose whatever by Appellant and it is only now when the land becomes valuable with the increased commercial importance of the City of Juneau, that it has been determined by Appellant to attempt to hold it. None of Appellant's acts with reference to the use, occupancy or possession of this ground were distinct or of such as the character of the tidelands reasonably admits. The land was susceptible of use for wharfing purposes or such uses as those to which Appellee put it. There was no such use by Appellant, nor were Appellant's acts hostile to any one, nor were they exercised in any such manner that they can be said to have any continuity whatever. They were not distinct, were temporary, sporadic and disconnected, doubtful and equivocal in their character and do not, and cannot be said to, indicate an intention to hold the land, and cannot be said to amount to possession.

The mere posting of notices, the surveying of land, the fixing of boundaries, or the payment of taxes, are not in themselves sufficient proof of possession. At best they can only be evidences of an intention to hold land.

1 Cyc. 235 and cases cited in notes.

It was held in *Worth vs. Simmons*, 28 S. E. (NC) 528, that the fact that the claimant of a large tract of land under a deed had sold and conveyed many small tracts within its boundary, is not sufficient to show actual possession.

The various acts claimed to have been performed by Appellant entirely fail to measure up to the rules of law as to what constitutes actual possession or in fact any kind of possession of the tidelands in question.

POINT IV.

Title to tideland in Alaska may not be acquired by adverse possession under color of title, as

(a) *Title to tideland is held by and in the United States in trust for the future state and the United States will not dispose thereof except for appropriate purposes, such as for the confirming of a grant by the ceding nation or the performance of an international duty, or in case of some public exigency.*

This question is discussed under Point I, and is settled by the case of *Shively vs. Bowlby*, supra. This Court has repeatedly announced this doctrine. It is restated here for the purpose of the argument.

(b) *Title by adverse possession ripens into a fee and title can be so acquired only in lands of the United States which are susceptible of being bought and sold, i. e., Public lands of the United States.*

“Adverse possession generally speaking, is a
“possession of another’s lands which, when ac-

"accompanied by certain acts and circumstances
"will vest title in the possessor. The pos-
"session to be adverse must be actual, positive, ex-
"clusive and hostile and continued during the
"time necessary to create a bar under the statute
"of limitations." 1, Cyc. 981.

It is too well established to require the citation of authorities that adverse possession will not run against the United States and that therefore no possession even of upland would establish, on the part of the occupant of land, title as against the United States. But the tidelands in the Territories of the United States are not susceptible of purchase or sale except under extraordinary conditions. The United States, through Congress has ever reserved tidelands for the disposition of the future state, and has never up to the present time disposed of tidelands except for the purpose of carrying out some grant of a ceding country. *Shively vs. Bowlby*, and other authorities cited, *supra*. Therefore it seems obvious that since tidelands in the Territory are not for sale and may not be patented, title thereto may not be obtained by adverse possession as against the United States and if not against the United States, then no title at all may be obtained therein.

This court in Tyee Consolidated Mining Co. vs. Langstead, 136 Fed. 124, p. 127, said

“But the rule of the Federal Courts is that the ‘statute of limitations does not begin to run

“against grantee of the United States until the
“issue of patent.”

In *Redfield vs. Park*, 37 L. Ed. 327, it was said that until title passed from the Government there is no title adverse to the entryman.

(c) *Tidelands in the Territory of Alaska are not Public Lands, and may not be sold nor fee in them passed except as specified in (a) above; Therefore no possession of tidelands in the Territory of Alaska can ripen into a fee either against the United States or the future state.*

This Court said in *Martin vs. Burford*, 181 Fed. 982, p. 985.

“For although as is shown in the opinion of
“this Court in the case of *Heckman vs. Sutter*,
“supra, the general land laws of the United
“States are not applicable to the Territory of
“Alaska, and therefore unless the building and
“site in question are a part of some mineral
“claim, the legal title to the land is still in the
“government. Still the act of Congress, May 17,
“1884, recognized and sanctioned *the actual pos-*
“*session* and use by an Indian or other person
“*of any land* in Alaska so that if it were true
“that the defendant had one store building and
“site at Farragut Bay they were legally entitled
“to sell to plaintiff the one-third interest therein
“which would have passed to him the right of

“possession and occupancy of said undivided interest as against everyone but the United States.”

In *Stark vs. Pierce*, 115 U. S. 408, at p. 413, 29 L. Ed. 428, the Supreme Court of the United States says:

“Mere occupancy of the public lands and improvement thereon give no vested right therein as against the United States, and consequently not against any purchaser from them.”

If the tidelands in the Territory are not Public Lands, they are not subject to purchase, sale, and patent and no title thereto may be obtained by adverse possession. Then Appellant, no matter how long it may have occupied any part of this tract by itself or others, derived no title thereby, and it can only be protected by reason of actual use, occupancy and possession under the Act of May 17, 1884, and it must stand or fall by that right. The only “true owner” of this tract is the United States. Therefore title to the tideland is not susceptible of being acquired by adverse possession.

(d) *Before a person's possession of a given tract of land can be deemed to be adverse so that the maintenance of that possession for the period prescribed by the Statute of Limitations will ripen into a fee, there must be another and an original, and resisting possession of the identical tract by another person claiming to be the “true owner” to*

which the new claimants possession is opposed, that is adversed. The "true owner" of the tidelands in question has always been the United States, therefore Appellant never could have acquired, nor did it acquire a fee by any occupancy or other act of itself or its predecessors, if any.

The general rule is that title by adverse possession cannot be acquired unless the possession is open, hostile and notorious. In order to make good a claim of title by adverse holding, the "true owner" must have actual knowledge of the hostile claim or the possession must be so open and notorious as to raise the presumption of notice to the world that the right of the "true owner" is invaded intentionally and with the purpose of obtaining title adverse to him, and must be so patent that the owner could not be misled, so that if he remains in ignorance, it is his own fault. 1 Cyc. 997, 5 M. A. L. Sec. 697, pp. 520.

In the case of *Pillow vs. Roberts* 13 How. 472, 476. the Court said:

"The statutes of limitations are founded on
"sound policy. They are statutes of repose and
"should not be evaded by a forced construction.
"The possession which is protected by them
"must be adverse and hostile to the "true
"owner."

Altschul vs. Quimet, 58 Pac. 95 p. 97.

It is, of course, necessary before title by adverse possession can be established, to have a "true owner" of the tract who may be deprived of title. The "true

owner" of this tract in question, was and is, and must always have been the United States, and neither Appellant nor its predecessors, nor any of them, could of course, have deprived the United States of its title. Neither Appellant nor any of its predecessors could have been the "true owner," consequently there never was a "true owner" of the tidelands in the sense of that rule against whom title by adverse possession could have been established, and there is no force in Appellant's contention in reference to its possession or that of Appellee and his acts. If Appellant be not the "true owner" it has the right to the tract only while actually using and possessing it, and while it is not in the actual use and possession of it, another may enter therein as in the case at bar, but such transaction does not fall at all within the meaning of the terms "adverse possession" as defined by the Courts. No matter what may have been Appellant's apparent possession, it was there, if at all, merely by sufferance and during the pleasure of the United States.

Ward vs. Cochran, 150 U. S. 597,

Bracken vs. Union Pac. Railroad Co. 75 Fed.
345,

(e) *There can be no color or claim of title to tidelands in Alaska, inasmuch as the title thereto is in the United States; the rule as to color and claim of title being applicable only to lands to which fee title may be acquired and which are subject to be held by prescription. A notice of location is not color of title.*

This proposition, we think follows from the authorities already cited and requires no special argument, it seeming to be clear that the rule as to color of title can only be applicable to lands to which title may be acquired. Inasmuch as the title to tidelands remains in the United States, there can be no title whatever in them, and consequently, no color of title.

Color of title for the purpose of adverse possession is that which has the semblance of title, legal or equitable, but which is in fact, no title. While it is not essential that the title under which the party claims should be a valid one, the title must be in writing and in the form of a conveyance. A party may not manufacture his own title and an instrument in order to operate as color of title must purport to convey color or claim of title therein or to those with whom he is in privity and must purport to convey land in controversy.

Until long after Appellant had abandoned the use of the entire waterfront, and had allowed buildings and wharf to go into ruin and decay, it never held or had any semblance of title whatever. In fact, it was not until April, 1898, as shown by the records that any conveyance was made to it. In fact, Appellant appears from the evidence to have gone into possession of the wharf, and in fact the upland merely by its actual possession and not under any location notice whatever, and to have used and occupied these during all the time until 1894 without

any written authority or color of title. The location notice claimed by Appellant as color of title does not meet with any of the requirements as to what shall constitute color of title. It is not a conveyance. It is not executed by Appellant, nor by anyone on its behalf, and purports to be on its face, merely a location notice. The authorities all indicate that color of title must be an instrument purporting to convey title. When the other instruments which do purport to convey title are examined it will be found that they were all executed in or subsequent to April, 1898, long after the abandonment of the wharf, and that in each instrument to Appellant it is specified that only such possession or right of possession is conveyed as parties were entitled to at that time, i. e.,

“Which the parties of the first part now have
 ‘or to which now or hereafter they may become
 “entitled to by virtue of any person, estate, or
 “or right in or to the shore and the waters and
 “land under the shores of Gastineau Channel
 “aforesaid.”

1, Cyc. 1082-3-5.

Whitney Lumber & Grain Co. vs. Crabtree,
 166 Fed, 738, 740.

Woodruff vs. Wallace, 44 Pac. 353, 364.

(f) *The deeds of the Townsite Trustee purporting to convey to Appellant or its grantors, title to soil in Alaska, covered and uncovered by the flow of the tide, that is, a large tract of tidelands including that piece in controversy was ineffective as to*

tide lands as "Appellant would thereby take nothing below the high tide line for the government had not parted with its title."

This point is settled fully and finally in the case of Pacific Coast Company vs. McCloskey, *supra*, which passes upon the same instrument which Appellant here relies upon.

POINT V.

Possession of tidelands, being susceptible of transfer, may be abandoned. The acts of Appellant disclosed by the evidence constitute abandonment.

That the right of possession of tidelands may be transferred has been settled beyond question in this jurisdiction, the decisions of this Court being repeatedly to that effect. The decisions of this Court above cited and many others settle this proposition. It is obvious that any possession which may be conveyed or transferred may be abandoned.

"To constitute an abandonment the premises
"must be left vacant without intention to re-
"claim the possession, and open for occupation
"for anyone who enters.

1 Cys. 4, 6, 7,

Smith vs. Cushing 41 Cal. 471, p. 499.

Abandonment is a question of intention and of this intention the jury were to judge in view of all the facts and circumstances in the case.

Meyers vs. Spooner 55 Cal. 257 p. 266.

In the case of *Sabaringo vs. Maverick*, 124 U. S.

261 at 300, 31 L. Ed. 430, the Supreme Court says:

“It follows that in cases where the proof on
 “the part of the plaintiff does not show a posses-
 “sion continuous until actual dispossession by
 “the defendant or those under whom he claims,
 “the burden of proof is upon the plaintiff to
 “show that his prior possession has not been
 abandoned.”

Appellant's own evidence in the case at bar shows that in 1894 Appellant discontinued use of the wharf site and no longer exercised any of those rights of dominion over it by which it claims to have established its original possession, that is, by the use of the wharf as a landing place for vessels, and it would seem that the burden of proving that its possession had not been abandoned, was upon the Appellant itself. Its evidence as to later acts being merely the permission to Messerschmidt, the lease to Davidson and the payment of taxes on the general tract scarcely comes within the terms of this decision.

This Court, in deciding *Lydbloom vs. Rochs*, 146 Fed. p. 660-4 (after quoting the *Sabaringo* decision said:

“The language so used was applied to the
 “particular facts in the case then before the
 “Court and it expresses the doctrine that if the
 “plaintiff's possession is not *continuous* until the
 “actual dispossession by the defendant or those
 “under whom he claims, the burden of proof to
 “rebut the presumption of abandonment is

“placed upon the plaintiff.”

The Court then after some further discussion points out that the case it is then considering is not like the Sabaringo case.

“in which the premises were left unoccupied
“and possession was not demanded by the former
“possessor for so long a period as to require
“proof that he did not intend to abandon it.”

It would seem that the language of this Court in this respect fits exactly the facts of the case at bar. For as it appears by the evidence Appellant, through its agents, and servants was aware of the use, occupancy and improvement this tract by Appellee during all these years from 1900 on, and at no time and under no circumstances did Appellant order Appellee to vacate the ground or demand possession of it from him. Under these authorities the burden of proving that it had not abandoned was upon Appellant and we submit that it has failed to do so.

The Circuit Court of Appeals of the Eighth Circuit in Northern Exploration Co., vs. Adams, 104 Fed. 404-5, said in reference to the subject of abandonment:

“It may be expressed or implied. It may be
“be effected by a plain declaration of intention
“to abandon it (water right) and it may be in-
“ferred from acts or *failures to act* so inconsis-
“tent with the intention to retain it that the
“unprejudiced mind is convinced of the renuncia-
“tion * * * .” In the case in hand there was

“no express declaration of the surrender of the
 “rights which the grantors of Appellee acquired
 “in 1886 and the issue of abandonment resolved
 “itself into a question of fact *to be determined*
 “*by the course of action* which the parties
 “pursued and the circumstances surrounding
 “them as they were developed in the evidence.”

An examination of the evidence here shows beyond any question that when Appellant built its new wharf at the foot of Main Street in the Town of Juneau, its purpose was to no longer use the tract where it had formerly landed its vessels. This is patent from all its acts and omissions to act. The circumstances of its allowing the wharf and approach as well as the buildings to go into ruin and decay and its failure to exercise any acts of dominion over the tract in controversy or at the old wharf itself, alone without anything else, are indicative of an intention to abandon it. In any event, no claim was made to the ground and Appellant went so far as to give Appellee permission to construct part of his approach to the gridiron on the land in controversy, over and across a corner of the tract then claimed by Appellant. This, unquestionably called to the attention of Appellant the fact that Appellee was placing permanent improvement upon the tract so that under such circumstances, a failure even at that late day to notify Appellee that Appellant still claimed a right there, must be taken as abandonment. The general proposition as to what consti-

tuates abandonment as stated in Appellant's Brief and presented by argument to the Court seem to be correct statements of the law in the main. However, the facts in this case do not fit Appellant's application thereof, to the law.

POINT VI.

Tidelands which are open, unappropriated, unused, unoccupied and unimproved may be appropriated, used, occupied, possessed and improved by any person, subject always, (1) to the control of the United States under its constitutional right to protect and regulate commerce and navigation. (2) To the dominion, sovereignty and ownership of the future state, and (3) To any existing littoral or riparian rights.

A discussion of this point, seems unnecessary at it has been settled by the Supreme Court of the United States and by this Court in the authorities already cited. It must be apparent from the facts in this case that Appellant, if it ever had had any actual possession of this particular tract in question, which theory Appellee has consistently resisted, certainly abandoned any such possession in 1894 when it transferred its wharf business from the old wharf to the new wharf further in town. And in April 1900, when James went upon this tract the first time and began his use, occupancy and improvement

of it, there was no one in possession to resist the entry of Appellee or to contest the use or occupancy of the tract.

POINT VII.

Appellant, having abandoned any possession of this 113 feet which it ever may have had, could have no other rights therein or thereover, than were incident to its ownership if it was the owner, of the abutting upland, that is to say, the littoral right or right of access to and from the deep and navigable waters of Gastineau Channel, but this is not a title to the soil below high water mark; it is merely and only an easement.

The authorities already cited cover this point. The first and primary right to the use of tidelands lies in the upland owner, and if Appellant was the owner of the upland abutting upon the tract in controversy in April, 1900, when Appellee went upon this tideland, then it undoubtedly, under the authorities, had the right of ingress and egress over the tidelands between the upland and the deep and navigable waters of Gastineau Channel and we think the evidence in this case plain that it was that right and that right alone which Appellant exercised at all times, and which was in Appellant's mind at the time that the permission was given to Messerschmidt, the lease was given to the Receiver Davidson, and the roadway along the westerly end of the tract was

deeded to the City as a public street. Not only *do the acts themselves point to this*, but the language used in the formal lease signed by the Vice-President and the Assistant Secretary of the Company under the corporate seal, specifically state that it is as owners of the upland that that lease was given and consequently it recognizes its own abandonment and was then and there relying upon its littoral right which was merely an easement.

Columbia Canning Co. vs. Hampton 161 Fed. 60.

POINT VIII.

An owner of upland abutting upon navigable waters may convey away and divest himself of his littoral and riparian rights; and Appellant's deed and dedication of a strip of upland abutting upon the line of mesne high tide along the 113 feet of upland in controversy without reservation, and forever, to the City of Juneau, as a public street, divested Appellant of all its littoral and riparian rights, and easement of access between the upland and the deep and navigable water, across the tideland in controversy.

This question is undoubtedly settled by a determination of this Court in *McCloskey vs. The Pacific Coast Company*, *supra*, which involved another piece of the larger tract of tideland lying on the opposite end of the wharfsite tract from the picece here in

question. The Company's deed and dedication of the tract which accompanied the map and which is found in the Record, pages 717, being Appellee's Exhibit "C", shows that Appellant in February, preceding the commencement of this suit, dedicated to the City of Juneau as a public street, which dedication was duly accepted, a strip of upland abutting upon the line of mesne high tide above the tract in controversy, thus cutting off any right which they may have had as littoral owners therein.

POINT IX.

Appellant, having thus abandoned whatever possession of the tideland in question it may have had if any, and having divested itself of its littoral and riparian rights across the foreshore, it is without any right to bring this suit.

This proposition, of course, unquestionably follows the former conclusions and requires no authorities to support it, other than those already cited in the case.

POINT X.

Even if Appellant had had any other right or interest in this tideland in controversy which might have been the subject of this suit, Appellant was not the real party in interest, nor the proper party to bring a suit as, prior to August 15, 1913, it had ex-

cuted deeds, and conveyances and contracts for deeds and conveyances of the foreshore in question.

The law of the Territory of Alaska, is that

“Every action shall be prosecuted in the name
“of the real party in interest except as other-
“A. 1913, Sec. 857.”

The exceptions do not embrace this case. An examination of the testimony of Ewing, Messerschmidt and Gemmett, and of Plaintiff's Exhibits 24-6-7, and Defendant's Exhibit "B", found respectively on pages 693, 699, 704 and 713, of the Record show that the Appellant had no right to commence this action, having parted with any right, title or interest which it may have had, if ever it had any, in the tideland in controversy.

CONCLUSION,

It would thus seem from a careful consideration of all of the evidence in the case, and the application of settled law in this Circuit to the facts, that the judgment of the Trial Court in this case should be affirmed. Even though Appellant should be found to have once had such a possession of this 113 feet as would have entitled it to remain undisturbed therein provided it maintained that possession, unquestionably the only conclusion to be arrived at from the evidence is that Appellant abandoned and left at least the tract in controversy in 1894, long prior to the time when Appellee went thereon and that appellant never thereafter had any connection therewith

save in the exercise of its littoral right as an upland owner. Of that right Appellant divested itself by conveyance and dedication of a strip of the upland abutting on the foreshore for use as a public street. Further, the evidence shows that the Appellee James, has in good faith and openly, notoriously, and continuously used, occupied, possessed and improved the tract in question, and all of it, from April, 1900, without let or hindrance from the Appellant and that in view of this, it is respectfully submitted that Appellee is the holder and owner and is entitled to the possession of the 113 feet of tideland in controversy, and that he should be allowed to continue undisturbed and uninterrupted in his possession and use thereof, and that the Judgment of the Trial Court should be affirmed.

Dated at Juneau, Alaska, November 17, 1915.

Respectfully submitted,

GUNNISON & ROBERTSON,
Attorneys for Appellee.

ROYAL A. GUNNISON
of Counsel.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

PACIFIC COAST COMPANY, a Corporation,
Appellant,

vs.

GEORGE E. JAMES and EDWARD WEBSTER,
Appellees.

REPLY BRIEF OF APPELLANT.

UPON APPEAL FROM THE DISTRICT COURT
FOR THE TERRITORY OF ALASKA,
DIVISION NUMBER ONE.

SHACKLEFORD & BAYLESS,
Attorneys for Appellant.

FARRELL, KANE & STRATTON,
Of Counsel, Seattle, Wash.

Filed

JAN 3 - 1916

F. D. Monckton,

NO. 2596.

**In the United States Circuit
Court of Appeals
For the Ninth Circuit**

PACIFIC COAST COMPANY, a Corporation,

Appellant.

vs.

GEORGE E. JAMES and EDWARD WEBSTER,

Appellees.

Appellant cannot accept the statements found on pages 1-5 of appellee's brief. Appellant does not claim that it has the fee title to the tract of tide lands in dispute, nor has it ever claimed title by adverse possession against the United States. We do claim that we are entitled to the possession as against appellee and all the world, and that our right to that possession can not be taken away, except, perhaps, by Congress or by the State which may in the future be erected out of the Territory of Alaska. Whether our right of possession or our right to purchase the tract when Congress shall provide the terms upon which we may acquire title as

set forth in the said Act of May 17, 1884, can be taken away is not a matter entering into the consideration of this case. The question is, what are our present rights?

Nor, as appellee contends, does our right to possession depend on our having maintained actual foot possession of the tract in question *at all times since May 17, 1884*. The Act itself (Sec. 8) is clear and unambiguous and needs no construction. Appellee attempts to inject into the act words that are not there and attempts to add a proviso to the Section, which was excluded by Congress; he seeks judicial legislation, and this, too, after the Court has several times, as shown by the cases cited in our opening brief, expressly construed the Statute and refused to so legislate.

The Statute provides, that

“* * * persons shall not be disturbed in the possession of any lands actually in their use or occupation or *now* claimed by them; but the *terms* under which such persons may acquire title to such lands is reserved for future legislation by Congress.”

Assume, for the sake of argument, that the lower court was correct in holding that the word “or” in the section should be construed to mean “and”. The word “now” in the Section clearly means May 17, 1884, the date of the passage of the Act. It cannot mean 1890, or 1895, or 1900 or 1913. “Now” means, at the *present time* (May 17, 1884) and cannot be distorted to mean sometime in the future. This being true, is the appellant a person falling within the Stat-

ute? In other words was the appellant, on May 17, 1884, in the use or occupation of the tide lands in dispute, claiming the same? There can be no doubt that this question must be answered in the affirmative. The memorandum decision of the lower Court so holds and the undisputed evidence so shows; the brief of appellee can not question it seriously for the evidence shows that from 1882 until 1895 the 113 feet was being *actually used* by appellant in the landing and mooring of vessels and that it *was necessary for that purpose*, the lower Court holding that the entire 600 feet of original location (p. 24 Record) was "a necessary adjunct to the use and enjoyment of the wharf as a landing place for such vessels as were operated by plaintiff" (appellant). Regardless of what may have happened since 1895, when appellant commenced to land vessels at the upper wharf, the statute has been fully met and appellant is entitled to the possession of the 113 feet, at least until Congress otherwise provides. We think it is clear that the rights and privileges recognized by the act of 1884 were vested rights, not merely inchoate, and this is the construction placed on the Act by the cases cited in our first brief; so that *when* Congress prescribes the *terms* we may acquire the title by complying therewith because we have earned the title by reason of our occupying and claiming the land at the time the Act of 1884 was passed. We have earned it as much as a homesteader who has fully complied with the public land laws has earned the title

to his homestead. We have the right to the possession in the meantime, but our opportunity to acquire title is merely deferred until there shall be "future legislation by Congress."

The question of non-user is therefore immaterial; our right to acquire title (when Congress permits) does not depend on constant use or upon improvements, as shown above. Appellant has earned the right to purchase (when Congress legislates) and it merely seeks to be protected in its right; this right to purchase is valueless unless we have the right to use and occupy after purchase, and if the Court holds we have lost our right to occupy then the right to purchase would be the mere shadow without the substance. The lower Court in its decision (p 27 Record) says:

"In 1884 the plaintiff had use, occupation and claim of the tide land in controversy,"

But holds that the plaintiff by non-use of the 113 feet abandoned the same. Even if the question of abandonment may properly be considered in this case, yet it has been shown in our first brief that there has been no abandonment.

We fail to see any basis for appellee's claim (page 5 Record) that appellant's only rights were littoral rights of an abutting upland owner. The decision of the lower Court (p. 24 *et seq* Record) holds otherwise (See above quotation from the decision). Appellant has such littoral rights and it has not lost the same, as we shall hereafter point out.

On pages 10 to 15 inclusive of appellee's brief is a statement of what he claims to be the established facts. It would not be useful to discuss each of the 23 paragraphs thereof but we point out that many of the alleged facts are not facts at all but unfounded conclusions of law. We again call the Court's attention to the statement of the facts as set forth in our original brief and to the testimony there referred to. The facts are practically undisputed. It was in the fall of 1883 that Murray defined the boundaries by driving piles (Record, p. 88 et seq, Ex. 19; p. 677 of Record) below high tide on the north and south boundary line of the tract. These piles were driven not only to mark the boundary but also for the purpose of mooring vessels to (Id.) and vessels of plaintiff were actually moored to them (Id.). (Deposition of Capt. Lloyd, Record p. 785 et seq and map attached to his deposition; also deposition of Capt. Hunter, Record p. 722.) Said Ex. 19 (p. 677) shows the location of the south pile to be on the south line of the wharf site and between high and low water mark, on the very 113 feet now claimed by appellee. That this 113 feet was in actual use by plaintiff in the landing of vessels from 1883 down to 1896 is incontrovertible. The wharf was completed in the year 1882. (Ev. Dautrick pp. 87 and 88 Record) and was continuously used till 1896. Murray sold the property and the appellant succeeded to all his rights. It is evident from all the evidence that the wharf and the said boundary piles were constructed

and driven by Murray, to all of whose rights appellant has succeeded. Appellee is mistaken in saying that no improvements were placed on the 113 feet prior to 1900. The pile driven thereon was certainly an improvement, and its use in mooring vessels, as shown clearly constituted a use and occupancy and possession contemplated by the Act of 1884. It was the very use to which the land was most susceptible in those early days, and such use was *necessary*. (Testimony *supra*.)

Every deed and every plat shows the claim of possession and of title down to low water mark as defined in Murray's original location and claim. The evidence also shows that whatever possession appellee ever had was permissive only and not held under such circumstances as to call upon appellant to order him off until 1913 when he started to make such improvements as would indicate an intention to claim adversely. His use was not exclusive for whenever occasion required appellant occupied and used, through its tenants, this 113 feet without objection from appellee, though with his express knowledge (Tes. Dautrick and Messerschmidt). In a new country like Alaska people are generous in helping others and it is not strange that appellant allowed appellee to use this 113 feet to facilitate his business; that generosity the appellee is attempting to abuse in which he should not be aided by a court of equity. If appellee removed boulders from the 113 feet it was for his own purposes to which appellant did not object. If this land had been inclosed

upland and a person entered thereon and put up improvements the law would require the owner to act more promptly than with reference to tide land in a sparsely settled community where the use to which appellee put the tideland did not interfere with the present purposes of appellant.

That the appellant has paid taxes on the whole 600 foot tract, including the 113 feet is clear, from the testimony of Dautrick (transcript p. 342-356), and Ewing (p. 361 et seq). If taxes were not paid prior to 1901 it was because the property was not taxed. On all these questions see also the testimony of Swan, record pp. 263 et seq. Paragraphs 20 and 21 on page 15 of appellee's brief we shall refer to later.

Appellee takes up pages 30 to 39 of its brief discussing appellant's brief. It will suffice to say that we think the brief will bear the closest scrutiny of the Court. Appellee in paragraphs (1), (2) and (3) of his brief, states what to him seems to be appellant's position, but appellant's position is not at all as there stated; for we claim to have been in actual possession of the whole 600 foot tract, including the 113 feet, on May 17, 1884, and that such possession was maintained up to July, 1905, but that since that time we have not actually been in foot possession of the 113 feet except by using, occupying, claiming and exercising dominion over the entire property.

We shall now briefly discuss the "Points" of Appellee's brief, in their order:

Point 1: Appellant has never claimed to own the fee to the tide land in question, although it is the well established law ever since the case of *Shively vs. Bowlby*, 152 U. S. 1, and *Mann vs. Tacoma Land Company*, 153 U. S. 273, that the United States has full and ample authority to grant a fee in tide land. See also *Jones vs. Callvert*, 32 Wash. 610. Notwithstanding this power it has not seen fit to convey tide land generally but to retain title for the future states. This Court and the District Court have frequently held that the act of 1884 applied to tide lands. See:

Carroll vs. Price, 81 Fed. 137.

Hecksman vs. Sutter, 119 Fed. 83, 128 Fed. 393.

McCloskey vs. Pacific Coast Co., 160 Fed. 794.

But we have not contended that the general public land laws, if made applicable to Alaska, would cover tide lands, but when Congress prescribes the terms of acquiring title to the tide lands in question (as set forth in the Act of 1884) then the person who was in the use and occupation thereof and claiming the same on May 17, 1884, will have the right to acquire the title. Congress may never prescribe the terms, but may retain title so that the same shall pass to the future state of Alaska, but that is mere speculation with which this case is not concerned.

Point 2: As we understand the ruling of the lower Court, it was not held that the person who used, occupied and claimed the tide land on May 17, 1884, must remain in the actual foot possession up to the

time he is permitted to acquire the title, but only held that if the use, occupancy and claim had and made on May 17, 1884 *was abandoned*, then the possession of the tide lands so abandoned might be taken by others. But it must be remembered that *mere non-user or failure to occupy is not abandonment*. The appellant has never abandoned; on the contrary it has consistently claimed the right of possession and has exercised that right whenever occasion required, for instance, prior to 1895 it actually used and occupied the 113 feet; since 1895, it has leased it and let it to tenants; it has looked after it as it has its other property; it instructed its agents to keep squatters off it; it has paid taxes on it regularly to the present moment; it has intended and still does intend to construct a wharf covering it entirely; it has exercised dominion, control and ownership over it at all times and conveyed certain rights therein. Surely it will not be held to have abandoned it when it has been shown that the whole 600 feet (which includes the 113 feet) are necessary to construct a public wharf to meet the needs of the public at Juneau. We are confident that a reading of the entire record will not induce a holding of abandonment, but the contrary thereof. See cases in our first brief.

Nor can we agree with appellee in his claim that foot possession must be maintained at all times, such a claim is in the very teeth of the statute. In no case having facts similar to those here has any court held, so far as we have been able to find, the law to be such

as to debar the appellant from its right of possession to the 113 feet; but the holding has been in favor of appellant. See cases cited in our first brief. The cases cited under point 2 of appellee's brief are not persuasive; what the Court said had reference to the facts in those cases, in all of which the actual possession had been maintained. Those cases do not militate against appellant.

Point 3: The evidence shows both that Murray and appellant entered upon the 600 foot tract; that the wharf was completed in 1882 and the mooring and boundary piles driven in 1883; that appellant has succeeded to all Murray's rights; that what appellant now claims is the identical tide lands described in Murray's location, that was built upon and defined by boundary stakes. The lower Court had no difficulty in deciding this point in appellant's favor. See maps and deeds in evidence and the testimony of all the witnesses.

The wharf was built in the very center of the 600 foot site for the good reason that 300 feet was necessary on each side of the center of the wharf for the proper and safe landing of vessels.

In *Nicomen Boom Co. vs. North Shore Boom & Driving Co.*, 40 Wash. 325, 82 Pacific 412, an appropriation was made of more land than was actually necessary for the present use and having in mind the future demands of the business. A claim of abandonment was made because this surplus land was not used. The Supreme Court in passing on this point said:

“If there was an abandonment, it must have been by virtue of non-use of the territory, in the way of failure to extend and operate the boom thereon. However in the absence of legislative provision to that effect, mere non-user does not of itself constitute an abandonment. It is held that, without such legislative provision, courts are not justified in fixing a limit at which mere failure to construct shall be held to be an abandonment. Abandonment is a question of intent, and while such intent may be found as a fact from long non-use, yet the non-use itself does not constitute an abandonment, and does not of itself defeat or impair acquired rights.”

Many authorities are there cited which hold that a claimant has a right to appropriate land sufficient to meet the future demands of his business and failure to use all of such land will not constitute abandonment.

The evidence in the case at bar conclusively shows that the appellant at all times has been holding this property for its future use, and now that the time for such use has arrived has already drawn the plans and stands in readiness to construct a dock on the whole of the property.

We have not claimed that the vessels themselves occupied any part of the 113 feet. The reason is obvious. Large deep sea vessels could not land above low tide; but the 113 feet above low tide were used in holding the vessels to the wharf and in preventing them from being damaged and in making it possible to unload them. This was actual occupancy of the 113 foot strip; possibly it was also the exercise of a littoral right.

Messerschmidt actually used the 113 feet in his operations under his lease. The evidence is clear on this point.

The lease to Davidson does say that appellant owned upland in front of which the leased land lay; that was literally true for it owned the fee to the upland; but that was not all the lease recited. It also said that all structures placed on the tide lands should become the property of appellant and should be yielded up to it, on the expiration of the lease, thus showing appellant's claim of possession and ownership. It also recites that Davidson obtained permission from appellant to enter upon the tide lands. There is nothing in the lease to show that appellant did not claim possession under the Act of 1884—in fact just the opposite appears.

The following cases, viz:

Delancy vs. Piepgrass, 33 N. E. 822, 827;

Seabrook vs. Coos Bay Ice Co., 89 Pac. 417;

Montgomery vs. Shaver, 66 Pac. 923,

cited under Point 3 by appellee, are not in point, as they deal with the question of the fee and are disassociated with any statute.

Under the rule in *1 Cyc.* 984, cited by appellee, the appellant has maintained sufficient possession.

Point 4: As to this it is sufficient to say that appellant does not claim title by reason of adverse possession under color of title, and what is said on pages 65 to 73 has no application.

Point 5: Under appellee's citations in his discussion of this point, appellant never abandoned; there was never any intention to abandon, the purpose always being to use and to construct the new wharf. This question of abandonment has been elsewhere herein discussed.

Point 6: The general statement that unoccupied and unappropriated public tide land may be taken possession of and that only the Government may complain may be a correct general statement of the law, but the facts in this case do not bring it within the principle.

Point 7: We never claimed the ownership of upland gives title to the tide land bordering thereon; but we agree with appellee's numerous statements in his brief to the effect that such upland ownership gives him the right of ingress and egress to and from his upland, over the tide land and out to deep water, and that such right is one that will be amply protected by the Courts. This is primary law and admitted by appellee; this brings us to a brief discussion of

Point 8: Frequent expressions are found in appellee's brief to the effect that the appellant "deeded" to the City of Juneau for street purposes a strip of upland bordering the line of high tide. This statement we most emphatically deny. There is not a scintilla of evidence to justify or excuse such a statement. It is apparent that this statement is made to make the facts in his case appear to be in conformity with those in

the case of *McCloskey vs. Pacific Coast Company*. Appellee points to Exhibit C (Record pages 716 to 720) to substantiate his statement. Exhibit C is merely a town plat and dedication of streets thereon; it is not a *deed*, as was given in the *McCloskey* case, *supra*; nor a *conveyance*; it does not convey the *fee* in the street to the town of Juneau, as was done in *McCloskey vs. Pacific Coast Company*, but merely grants an easement for the public to use the street for street purposes, that is for the purpose of passage. The fee in the street is still retained by the appellant and the appellant, notwithstanding the dedication, is still the owner of the upland upon which the 113 feet of tide lands abut.

The rule is thus stated in 13 Cyc. 486—Note 74:

“Where the owner of property makes a common law dedication the ultimate fee remains unaffected thereby. The effect of the common law dedication is not to deprive a party of title to his land but to estop him while the dedication continues in force from asserting that right of exclusive possession and enjoyment which the owner of property has.” (Citing numerous authorities.)

In *Perley vs Chandler*, 4 Am. Decisions 159 (Mass.), the rule is thus stated:

“By the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner, although incumbered with a way. And every use to which the land may be applied, and all the profits which may

be derived from it, consistently with the continuance of the easement, the owner can lawfully claim."

See also:

- Rowe vs. James*, 71 Wash. 267, 128 Pac. 539;
Holm vs. Montgomery, 62 Wash. 398, 113 Pac. 1115;
Bradley vs. Spokane & Inland R. R. Co., 79 Wash. 455, 140 Pac. 688;
Meir vs. Portland Cable Ry. Co., 16 Oregon 500, 19 Pac. 610.

It is plain that if this street is ever abandoned in the future then the use of the property returns to the appellant if it is still the owner of the abutting property. Whatever rights the appellant ever had, as fee owner, including the rights of undisturbed access to the water, it still possesses, subject only to the burden of having its property used for street purposes. If the appellee is permitted to use these tide lands for permanent wharf structures then the appellant merely by giving an easement for road purposes to the public must be held to have given to the appellee, a private person, the exclusive right to usurp and use the appellant's littoral rights by building a wharf. If the road is abandoned then instead of receiving the street property back free from the easement granted the appellant will find that his valuable littoral rights are in possession not of the public but of a third party who, if permitted to remain, will no doubt claim a right thereto by virtue of continued possession.

In the State of Washington the Statute of 1890 gave the upland owner the preference right to purchase from the State the abutting tide land. In the case of *Gifford vs. Horton*, 54 Wash. 595, 103 Pacific 988, the Supreme Court of Washington held that where an owner of property abutting on tide lands dedicated a street which abutted on the land side of the tide land and skirted the water edge of the upland, then the grantees of the dedicator still owned the fee of the street and as such owners were the "upland owners" who were entitled to the preference right to purchase the tide lands in question. Many cases from different states are there cited in support of this ruling.

So it clearly appears that all of appellant's littoral rights arising out of upland ownership are still intact and furnish in themselves, and without reference to the Act of 1884, ample ground for a decision of this case in favor of the appellant.

The facts in the McCloskey case cited by counsel differ from those in the case at bar; there an absolute deed was given to the city to the street property, therefore the fee to the street passed to the city. In this case there was no such deed. This property was dedicated. That case was based upon different facts and can only be an authority in a case with similar facts. That case does, however, squarely decide that persons claiming or in possession of tide land properties under the Act of 1884 could not be ousted from them. These are the facts and exactly our contention in the case at

bar. As was shown heretofore the appellant herein was in possession of the tide lands now being claimed by the appellee and therefore under authority of *McCloskey vs. Pacific Coast Co.*, 160 Fed. p. 801, is now entitled to the land in question. This in reality was the final decision of the McCloskey case and not mere obiter as was the point contended for by appellee.

We here call attention to the fact that the McCloskey case was decided in 1908 and that the dedication in the case at bar was not made until 1913.

Point 9: It is a bare assumption on appellee's part to claim that appellant has lost its right either by the abandonment under the Act of 1884 or by conveyance of the upland.

Point 10: Appellee claims that because appellant prior to the commencement of this action gave the following instruments, to-wit:

1. Contract for deed to Messerschmidt covering Lot 14 in Block 1, of Pacific Coast Addition. (Ex. 24, p. 693, Record);

2. Contract for deed to Gemmett covering Lot 2 in Block 3, same Addition (Ex. 26, p. 699, Record);

3. Contract for deed to Gemmett covering Lots 3 and 4 in Block 3, same Addition (Ex. 27, p. 704, Record);

4. Quit claim deed to Messerschmidt covering Lot 15 in Block 1, same Addition (Defts. Ex. B, p. 713, Record),

it is not a proper party to maintain this suit.

Page 804 of the record is a plat of The Pacific Coast Addition. By glancing at it one will observe that there is a strip of tide land lying between lots 13, 14 and 15, in Block 1, and the low tide line. To this strip the appellant has never given any contracts or conveyances. That fact alone is a sufficient answer to appellee's contention.

It will also be noticed that appellant still has the legal title to Lots 2, 3 and 4 in Block 3, in front of and abutting on which the 113 feet of tide lands lie.

Lot 13 in Block 1 (to which appellee claims the right of possession), has never been conveyed or contracted to be sold by appellant.

Appellee claims the right of possession to all of Lots 13 and 14 and the south 13 feet of Lot 15, in Block 1, together with the right of possession of all tide lands in front of the same out to deep water.

The said contracts and deed also each provides that the Pacific Coast Company, appellant, reserves all littoral, riparian and tide land rights so the rights it is now claiming have not been parted with. Moreover if the reservation had not been made it would still have such an interest as to enable it to maintain the suit for the benefit of those holding under it. However, as stated it has never parted with any interest in the largest portion of the tide lands claimed by appellant.

It is submitted that the decree should be reversed.

Respectfully,

SHACKLEFORD & BAYLESS,

Attorneys for Appellant.

FARRELL, KANE & STRATTON,

Of Counsel.

1011 American Bank Bldg., Seattle, Wash.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

VS.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

Filed

JUL 1 - 1915

F. D. Monckton,

Clerk

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

VS.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Admission of Service of Bill of Exceptions.....	236
Amended Complaint	2
Amendment to Defendants' Proposed Bill of Ex- ceptions, Plaintiffs'	290
Answer of Court to Writ of Error	268
Answer to Second Amended Complaint.....	16
Assignment of Errors.....	239
Attorneys of Record, Names and Addresses of..	1
Bill of Exceptions, Minutes re Settlement of...	292
Bill of Exceptions to Order Allowing Amend- ment of Complaint.....	26
Bill of Exceptions to Rulings Made at the Trial.	60
Bill of Exceptions to Ruling on Motion to Strike First Amended Complaint	35
Bill of Exceptions to Ruling on Motion to Strike Second Amended Complaint.....	44
Bond on Writ of Error.....	262
Certificate of Clerk U. S. District Court to Sup- plemental Transcript of Record.....	292
Certificate of Clerk U. S. District Court to Transcript of Record	272
Citation on Writ of Error.....	269
Complaint in Bill of Exceptions.....	26

Index.	Page
Defendant's Case	132
Demurrer to Second Amended Complaint.....	14
DEPOSITIONS ON BEHALF OF PLAIN- TIFFS:	
ALLISON, MRS. CHARLES.....	98
Cross-examination	101
Redirect Examination	106
Recross-examination	106
Redirect Examination	108
BAIN, CHARLES N.	119
Cross-examination.....	122
Redirect Examination	122
JOHNSON, CHARLEY	118
MEINHARDT, MRS. KATY.....	109
Cross-examination	110
Redirect Examination	111
Recross-examination	111
Redirect Examination	112
SWANT, FRED	123
SWEETMAN, R. H.	113
Cross-examination	115
Redirect Examination	117
Recross-examination	117
Exception Taken at Conclusion of Trial.....	198
Exceptions to Instructions, Objection and.....	232
Exceptions, to Order Allowing Amendment of Complaint, Bill of	26
Exceptions to Rulings Made at the Trial.....	60
Exceptions to Ruling on Motion to Strike First Amended Complaint, Bill of.....	35

Exceptions to Ruling on Motion to Strike	
Second Amended Complaint, Bill of.....	44

EXHIBITS:

Plaintiffs' Exhibit No. 1—Diagram.....	274
Plaintiffs' Exhibit No. 2—Photograph.....	275
Plaintiffs' Exhibit No. 3—Photograph.....	276
Plaintiffs' Exhibit No. 4—Photograph.....	277
Plaintiffs' Exhibit No. 5—Diagram.....	278
Instructions	214
Instructions Requested by Defendant.....	201
Judgment..	24
Memorandum Opinion on Motion to Strike....	41
Minutes, November 18, 1914, the Settlement of	
Bill of Exceptions, etc.....	292
Motion to Strike.....	45
Motion to Strike Amended Complaint or Cer-	
tain Parts Thereof.....	36
Motion to Strike Certain Parts of Second	
Amended Complaint	44
Name and Addresses of Attorneys of Record....	1
Objections and Exceptions to Instructions.....	232
Opinion on Motion for a New Trial.....	284
Opinion on Motion to Strike, Memorandum....	41
Order Allowing Writ of Error.....	264
Order and Decision.....	282
Order Denying Motion to Strike from Second	
Amended Complaint.....	59
Order Directing Transmission of Original Ex-	
hibits	270

Index.	Page
Order of Submission and Motion for a New Trial, etc.....	292
Order Overruling Demurrer to Second Amended Complaint, etc.....	15
Order Settling and Allowing Bill of Exceptions.	237
Order Settling and Allowing Bill of Exceptions to Order Allowing Amendment of Complaint	32
Order Settling and Allowing Bill of Exceptions to Ruling on Motion to Strike Certain Parts of Second Amended Complaint.....	58
Order Settling and Allowing Bill of Exceptions to Ruling on Motion to Strike First Amended Complaint.....	34
Petition for Writ of Error.....	260
Plaintiffs' Amendments to Defendants' Proposed Bill of Exceptions.....	290
Praeceptum for Supplemental Transcript of Record.....	281
Reply.....	21
Second Amended Complaint.....	7
Stipulation Re Bill of Exceptions.....	236
Stipulations Under Which Depositions Were Read in Evidence.....	199
TESTIMONY ON BEHALF OF PLAINTIFFS:	
ANDERSON, GEORGE.....	128
Cross-examination.....	129
ENNIS, HERBERT L.....	61
Cross-examination... ..	70
Redirect Examination.....	80
Cross-examination... ..	87
Recalled	95

Index.	Page
TESTIMONY ON BEHALF OF PLAIN- TIFFS—Continued:	
Cross-examination	97
In Rebuttal	196
Cross-examination	197
HAMILTON, JOHN	125
Cross-examination	128
TESTIMONY ON BEHALF OF DEFENDANT:	
ANDERSON, GEORGE	185
Cross-examination	186
BROCKMAN, Dr. D. R.	162
GARDNER, WILLIAM	132
Cross-examination	137
HAMILTON, JOHN	189
Cross-examination	195
HUBENER, CHARLES	138
Cross-examination	148
Recross-examination	150
LUNDQUIST, JOHN	176
Cross-examination	180
Redirect Examination	184
PROVOST, AL	154
Cross-examination	160
Redirect Examination	162
TORQUESON, J. A.	164
Cross-examination	167
Verdict	23
Writ of Error	266

Names and Addresses of Attorneys of Record.

R. O. LUNKE, Esq., of Culbertson, Montana, and
Messrs. WALSH & NOLAN, of Helena, Mon-
tana,

Attorneys for Plaintiffs and Defendants in
Error.

Messrs. VEAZEY & VEAZEY, of Great Falls, Mon-
tana,

Attorneys for Defendant and Plaintiff in
Error. [1*]

*In the District Court of the United States, in and for
the District of Montana.*

No. 960.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
et al.,

Defendants.

BE IT REMEMBERED, that on Aug. 12, 1911,
the amended complaint of plaintiffs was filed herein,
being in the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Record.

*In the District Court of the Twelfth Judicial District
of the State of Montana, in and for the County
of Valley.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
a Corporation, and JOHN HAMILTON,
Defendants.

Amended Complaint.

The above-named plaintiffs, first having obtained leave to do so, file this their amended complaint, and for cause of action against defendants allege:

I.

That at all of the times hereinafter mentioned the defendant Great Northern Railway Company, was, and is, a corporation organized and existing under the laws of the State of Minnesota, and at all of said times owned and operated a line of railway running across the State of Montana and across Valley County, in said State, and at all of said times owned, in connection with said railway company, what is known as a right of way, which right of way, at the places hereinafter referred to, where the runaway occurred, embraced a strip of ground about seventy-five feet on each side of the track and running parallel to the track.

II.

That on the 18th day of April, 1909, and for a long time prior thereto, the defendant, John Hamilton,

was in the employ of the defendant company as section foreman, and as such section foreman had supervision and control of that portion of the railway and right of way of the defendant company, more particularly described as follows: That portion of said railway and right of way [3] between sections one and two, township twenty-seven north, range fifty-eight east, Montana Meridian, in Valley County, and as such section foreman it become, and was, his duty to abate on said right of way so under his control and supervision any nuisance, public or private, that might exist thereon.

III.

That on the 18th day of April, 1909, and for more than four years prior thereto, there crossed said railway and right of way at a certain point thereof, so under the jurisdiction of the said John Hamilton as aforesaid, a roadway, recognized as such by the defendants, and used by the traveling public as a public roadway, which said roadway, after crossing said railway and right of way, ran to the town of Baineville, and to points beyond; that with such roadway so used as aforesaid, the defendants recognized the public use of same, and for more than four years next preceding the 18th day of April, 1909, defendants, for the accommodation of the public so using said roadway as it crossed said right of way, constructed and maintained a plank crossing where said roadway crossed its tracks, and erected and maintained at said crossing a railway warning signal to the traveling public using said roadway and constructed and maintained at said point cattle-guards

and fences such as are maintained where public highways cross railroad tracks, and for more than four years next preceding the 18th day of April, 1909, the said defendants treated said roadway as if it were a public highway, and during all of said time the defendants knew that the said roadway so crossing its said track and right of way was used by the traveling public, and was so used without objection and with the tacit consent of the said defendant company. Plaintiff further avers that for more than three years preceding the 18th day of April, 1909, the county commissioners of Valley County assuming that said roadway was a public highway expended public money in its maintenance and repair, so that said [4] roadway would be fit and suitable for public travel, which fact the defendants well knew, or in the exercise of reasonable diligence should have known.

IV.

That the defendant company during the month of December, 1908, placed, and caused to be placed, on its said right of way, and in close proximity to said traveled roadway as it passed across said right of way, the carcass of a horse, and the said defendants thereafter negligently permitted and allowed said carcass to remain where it was so placed exposed to view, so that on, and for more than a month prior to the 18th day of April, 1909, the said carcass so remained on said right of way and in close proximity to said roadway, and exhaled noxious and putrid odors offensive to those traveling on said roadway.

V.

Plaintiffs further aver that said carcass so negligently permitted to remain on defendant company's right of way, and so exhaling said odors, become and was a public nuisance, and by reason of its appearance, and by reason of the odors which it exhaled, became an object likely to frighten teams driven along said roadway where said carcass lay, all of which the defendants well knew, or in the exercise of reasonable diligence should have known.

VI.

Plaintiffs further aver that on the said 18th day of April, 1909, one Nettie Ennis, a resident of Valley County, then and there the wife of the plaintiff, Herbert L. Ennis, and then and there the mother of the plaintiff, Guy W. Ennis, was using said roadway, and so using said roadway was riding in a buggy, to which was attached a team of horses, which said team was driven by one John Bigelow, and which said team was then and there, and at all times, gentle and tractable. [5]

VII.

That said team being so driven as aforesaid, when at and near the point on said roadway near where said carcass was, became frightened at said carcass and shied at same, and so becoming frightened and shying started to run away, and did run away, and so running away the said Nettie Ennis was thrown violently from said buggy and against a barbed wire fence, and so being thrown she received internal injuries to her kidneys, and other internal organs, and also received bruises and wounds to her body, from

which injuries, bruises and wounds she thereafter died.

VIII.

That by the death of said Nettie Ennis the plaintiff, Herbert L. Ennis, has been deprived of the comfort, society and association of his wife, and that said Guy W. Ennis, has been deprived of the care, supervision, society and attention of a mother, and both of said plaintiffs have been deprived of the services of the said Nettie Ennis, all to their damage in the sum of Twenty-five Thousand (\$25,000.00) Dollars.

IX.

Plaintiffs further aver that they are the only heirs at law of the said Nettie Ennis, deceased.

WHEREFORE, plaintiffs demand judgment against the said defendants for the sum of Twenty-five Thousand (\$25,000.00) Dollars, together with costs of suit.

R. O. LUNKE,

WALSH & NOLAN,

Attorneys for Plaintiff. [6]

State of Montana,

County of Lewis & Clark,—ss.

C. B. Nolan, being first duly sworn, upon oath deposes and says: That he is one of the attorneys of the above-named plaintiffs, and makes this verification in their behalf for the reason that said plaintiffs are absent from the County of Lewis & Clark where said attorney resides; that he has read the foregoing amended complaint and knows the contents thereof, and that the facts therein stated are

true to his best knowledge, information and belief.

C. B. NOLAN.

Subscribed and sworn to before me this 12th day of August, 1911.

[Seal]

MATHIAS STAFF,

Notary Public for the State of Montana, Residing at Helena.

My commission expires Feb. 18, 1914.

Filed Aug. 12, 1911. Geo. W. Sproule, Clerk.

[7]

Thereafter, on July 27, 1912, a Second Amended Complaint was filed herein, as follows, to wit. [8]

In the District Court of the United States, in and for the District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and JOHN HAMILTON,
Defendants.

Second Amended Complaint.

The above-named plaintiffs, first having obtained leave to so do, file this their second amended complaint, and for cause of action against defendants allege:

I.

That at all times hereinafter mentioned, the defendant Great Northern Railway Company was and is a corporation, organized and existing under the

laws of the State of Minnesota, and at all of said times owned and operated a line of railway running across the State of Montana and across Valley County, in said State, and at all of said times owned, in connection with said railway, a right of way, which right of way, at the place hereinafter referred to, as used for a roadway and as the place where the runaway hereinafter referred to occurred, embraces a strip of ground about seventy-five feet wide on each side of the track, running parallel to said track.

II.

That on the 18th day of April, 1909, and for a long time prior thereto, the defendant John Hamilton was in the employ of the defendant company as section foreman, and as such section foreman had supervision and control of that portion of said railway [9] and right of way of the defendant company more particularly described as follows: That portion of said railway and right of way between Sections 1 and 2, Township 27 North, Range 48 East, Montana Meridian, in Valley County, being the portion of said right of way where said roadway crosses, and as such section foreman, it became and was his duty, for and in behalf of the defendant company to remove from said right of way, so under his control and jurisdiction and abate any nuisance, public or private, that might exist thereon.

III.

That on or about the year 1906, the county commissioners of Valley County, on proceedings taken for that purpose, undertook to lay out a public

highway in said county, for use by the travelling public, and in said year took such steps in relation thereto that a certain roadway was laid out and established by said county commissioners, which said roadway crossed said railway right of way of the defendant company at a certain point thereof, the same being the point heretofore referred to as under the jurisdiction and supervision of the defendant John Hamilton. Plaintiffs further aver that in connection with the laying out and establishing of said roadway, as aforesaid, and in connection with the proceedings so had, as aforesaid, by the said county commissioner, the defendant company granted to said Valley County, for use over its said right of way, a right of way for said roadway, which said right of way, so granted by said defendant company for such roadway, as it crossed the right of way and track of the defendant company, was approximately about sixty feet wide.

IV.

Plaintiffs further aver that the said roadway so attempted to be laid out, as a public highway, as aforesaid was in said year opened for travel and public use, and so open for travel and public use crossed the right of way and tracks of the defendant [10] company, as aforesaid, and so opened and used extended to the town of Baineville, in said Valley County, where a postoffice was maintained, and to points beyond, and since said roadway was so opened for travel, in said year, said roadway has been used at all times since then as if it were a public highway by the travelling public.

V.

Plaintiffs further aver that ever since said roadway was laid out and opened, as aforesaid, the county commissioners of Valley County have treated it as if it were a public highway and have expended money in its opening, maintenance and repair.

VI.

Plaintiffs further aver that after said roadway was laid out and opened, as aforesaid, and after said defendant company granted a right of way for same across its said premises, as aforesaid, the defendant company placed and maintained across its tracks a plank crossing for use by the public travelling on said roadway, and ever since said roadway was opened, as aforesaid, the defendant company has placed and maintained, where said roadway crossed its right of way, a warning signal that a public crossing existed there and has installed and maintained fences and cattle-guards bordering said roadway, as the same passes over its said right of way, and has in all respects, since the year 1906, treated said roadway as established across its right of way as if it were a regularly laid out public highway.

VII.

Plaintiffs further aver that the said defendant company, when the said roadway was laid out and opened, as aforesaid, dedicated for public use, an easement for roadway purposes in the ground covered by said roadway, as it crossed its said right of way, and for more than six years last past the defendant company has invited all persons using said roadway, to use that [11] portion of same cross-

ing its right of way, and at all of said times, and now, the defendant company knew that the travelling public used said roadway as it crossed its said premises, and knew that the said roadway was so used by them as if it were a public highway, and this use was enjoyed by the travelling public with the knowledge and consent and permission of the defendant company.

VIII.

Plaintiffs further aver that during the month of December, 1908, the defendant company placed, and caused to be placed on its said right of way and in close proximity to said traveled roadway, and in such position so that it could readily be seen by animals travelling on said roadway, as it crossed said right of way, the carcass of a horse.

IX.

Plaintiffs further aver that the defendant company negligently permitted said carcass to remain where it was so placed by it, as aforesaid, from the month of December, 1908, until the 18th day of April, 1909, and thereafter and for more than a month prior to the said 18th day of April, 1909, the said carcass so in said place, suffering decomposition, exhaled noxious and putrid odors, so that on the 18th day of April, 1909, and for some time prior thereto, on account of the shape it then assumed and on account of the odors it then exhaled, so in close proximity to said roadway, it became and was a public nuisance, and became and was an object likely to frighten teams driven along said roadway, all of which the defendants well knew, or, in the exercise

of reasonable diligence, should have known.

X.

Plaintiffs further aver that on said 18th day of April, 1909, one Nettie Ennis, then and for some years prior thereto, a resident of Valley County, and then the wife of the plaintiff Herbert L. Ennis and the mother of the plaintiff Guy W. Ennis, [12] at the invitation of the defendant company, as aforesaid, was using said roadway as one of the travelling public, and, so using said roadway, was riding in a buggy, drawn by a team driven along said roadway, which said team was driven by one John Bigelow and which team was then and there, and at all times, tractable and gentle.

XI.

Plaintiffs further aver that while said team and buggy, so driven as aforesaid, with the said Nettie Ennis in said buggy, on said roadway, in close proximity to where said carcass was, as aforesaid, and while said driver was exercising due care in the management of said horses, and without knowledge on his part, or on the part of the said Nettie Ennis, that the said carcass and the odor therefrom would cause said team to become frightened and run away, the said team, so on said roadway, and in close proximity to where said carcass lay, was frightened by said carcass, and the odor therefrom, and the said carcass and the odor therefrom, at said time, caused said team to run away and the said team, thus running away, caused the said Nettie Ennis so in said buggy, to be thrown violently therefrom, and against a barbed wire fence, and the said Nettie Ennis, so

being thrown from said buggy, as aforesaid, and by reason thereof, received injuries to her kidneys and other internal organs, and also received bruises and wounds on her body, from which injuries, bruises and wounds, and by reason thereof, she thereafter died.

XII.

That by the death of the said Nettie Ennis, the plaintiff Herbert L. Ennis has been deprived of the comfort and society and association of his wife, and the plaintiff Guy W. Ennis has been deprived of the care, supervision, society and attention of a mother, and both of the plaintiffs have been deprived of the services of the said Nettie Ennis, all to their damage in the sum [13] of Twenty-five Thousand Dollars.

XIII.

Plaintiffs further aver that they are the only heirs at law of the said Nettie Ennis, deceased.

WHEREFORE, plaintiffs pray judgment against the defendants for the sum of Twenty-five Thousand Dollars, together with costs of suit.

R. O. LUNKE,
WALSH & NOLAN,
Attorneys for Plaintiffs.

United States of America,
District of Montana,—ss.

C. B. Nolan, being duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiffs, and makes this verification on their behalf; that he has read the foregoing second amended complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

Affiant further says that he makes this verification for the reason that the plaintiffs are absent from the County of Lewis and Clark, State of Montana, in which county affiant is and resides.

C. B. NOLAN.

Subscribed and sworn to before me this 27th day of July, 1912.

[Seal]

C. E. PEW,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires Sept. 30, 1914.

Filed July 27, 1912. Geo. W. Sproule, Clerk.

[14]

Thereafter, on January 20, 1913, Demurrer to second amended complaint was filed herein, as follows, to wit: [15]

*In the District Court of the United States, in and for
the District of Montana.* ..

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, et al.,

Defendants.

Demurrer to Second Amended Complaint.

Comes now the defendant, Great Northern Railway Company, leave of Court having been first had and obtained to further plead to said complaint without waiving and expressly preserving to the defendant

exceptions to the rulings heretofore made in this cause and heretofore settled or to be settled in Bills of Exceptions herein, and demurs to the second amended complaint of the plaintiffs on file herein, and, as grounds of demurrer, says: That said complaint does not state facts sufficient to constitute a cause of action against this demurring defendant.

VEAZEY & VEAZEY,

Attorneys for Defendant, Great Northern Railway
Company.

Filed Jan. 20, 1913. Geo. W. Sproule, Clerk.
[16]

Thereafter, on January 27, 1913, an order overruling the demurrer to second amended complaint was entered herein, as follows, to wit:

**[Order Overruling Demurrer to Second Amended
Complaint, etc.]**

*In the District Court of the United States, in and for
the District of Montana.*

No. 960.

H. L. ENNIS et al.,

vs.

GREAT NORTHERN RAILWAY CO.

This cause came on regularly for hearing at this time upon demurrer to second amended complaint, and thereupon by consent of counsel, demurrer submitted without argument; whereupon, after due consideration, it is ordered that said demurrer be and the same hereby is overruled, and exception of defendant noted, and said defendant granted leave to

plead to second amended complaint without waiving exception.

Entered in open court January 27, 1913.

GEO. W. SPROULE,
Clerk. [17]

Thereafter, on February 15, 1913, answer to second amended complaint was filed herein, as follows, to wit: [18]

*In the District Court of the United States, in and for
the District of Montana.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY (a
Corporation), and JOHN HAMILTON,
Defendants.

Answer to Second Amended Complaint.

Leave of Court having been first had and obtained to further plead to the second amended complaint of the plaintiffs on file herein, without waiving and expressly preserving to this defendant exceptions to the rulings heretofore made in this cause, or heretofore settled or to be settled in bills of exceptions herein; comes now the defendant, Great Northern Railway Company, and for its answer to said second amended complaint of the plaintiffs, admits, alleges, and denies as follows, to wit:

I.

For its first separate answer to said second amended complaint, this answering defendant ad-

mits, alleges, and denies, as follows:

1. Save as hereinafter specifically admitted or denied, this answering defendant denies each and every allegation, matter, and thing in said second amended complaint contained.

2. This answering defendant admits the allegations of Paragraph I, of said second amended complaint. This answering defendant further admits that on the 18th day of April, 1909, and for more than a month prior thereto, John Hamilton, named in said second amended complaint, was in the employ of [19] this answering defendant, in a position known as "Section Foreman" of the railway of this answering defendant; and that a portion of said railway and right of way, referred to in Paragraph II, of said second amended complaint, was a part of that section of this answering defendant's railway, of which the said John Hamilton was, as aforesaid, section foreman.

3. In regard to the allegations of paragraphs numbered III, IV, V, VI, and VII of said second amended complaint, this answering defendant admits that on the 18th day of April, 1909, and for six months prior thereto, there crossed said railway and right of way, at a certain point thereon, a roadway; and that said roadway ultimately connected with a roadway extending to the town of Bainville, in Valley County, Montana, where a postoffice was maintained, and to points beyond; and that at the point where said roadway, crossing the track of this answering defendant, crossed the right of way of this answering defendant, there are, and always have

been since said roadway existed, fences and cattle-guards bordering the said roadway.

4. In regard to the allegations of paragraph VIII and IX, of said second amended complaint, this answering defendant admits that during the period stated in said paragraphs of said second amended complaint, the carcass of a horse lay near where the Nettie Ennis and John Bigelow, named in said second amended complaint, last attempted to drive across the railroad track of this answering defendant; and that this answering defendant and the said John Hamilton did not, during said period, remove said carcass.

5. This answering defendant further admits that at the time stated in paragraph X of said second amended complaint, the Nettie Ennis therein named was using said roadway and was riding in a buggy, drawn by a team driven by the John Bigelow therein named; and that, when near the point where the said [20] Nettie Ennis and John Bigelow attempted to drive said team across said track, the said team became frightened and ran away, and the said Nettie Ennis received injuries in said runaway, and thereafter died. But this answering defendant specifically denies that said team became frightened by said carcass and shied at the same; and this answering defendant specifically denies that said runaway was, in any manner or to any extent, caused by said carcass, or by its presence at the place aforesaid.

II.

For its second separate answer to said second amended complaint, this answering defendant says,

that, if this answering defendant was in any respect negligent in any of the matters stated in the second amended complaint herein, then and in that event plaintiffs' damage, if any, was due to, and caused by, their own contributing fault and carelessness, and to the contributing fault and carelessness of said Nettie Ennis, their and her agents, servants, and employees; and to the failure on the part of the plaintiffs and on the part of said Nettie Ennis, their and her agents, servants, and employees, and each of them, to exercise such reasonable care and caution, for the safety of said Nettie Ennis, as would, could and should, and ordinarily would, have been exercised by the average reasonably prudent person, under all the circumstances then and there existing, at all times and places stated in the complaint; and to the fact that the said Nettie Ennis and the said John Bigelow so negligently drove the said team of horses that the same ran away and escaped from their control. Further answering, this answering defendant says, that, if the matters of fact stated in said second amended complaint are true, then and in that event, in the exercise of such reasonable care and caution as the average reasonably prudent person, under all the circumstances then and there existing, would, could, and should, and ordinarily would, [21] have exercised, the plaintiffs, the said Nettie Ennis, their and her agents, servants and employees and the said John Bigelow would have known—and, in fact, actually did know—the facts stated in said second amended complaint, if the same were or are true and they, and each of them, had the last clear chance to

avoid the alleged negligence of this answering defendant and the damages, if any, resulting therefrom, and to avoid the said runaway and by the exercise of such reasonable care and caution aforesaid, as the average reasonably prudent person, under all the circumstances, would, could, and should, and ordinarily would, have exercised, they, and each of them, could, should, and would, and ordinarily would, have discovered and avoided the alleged negligence, if any, of this answering defendant, and the alleged dangers alleged in the complaint.

WHEREFORE, having fully answered, this answering defendant prays that it may be dismissed hence with its costs of suit.

VEAZEY & VEAZEY,

Attorneys for Defendant, Great Northern Railway
Company [22]

State of Montana,

County of Cascade,—ss.

I, Parker Veazey, Jr., being first duly sworn, deposes and says: That he is one of the attorneys for the defendant, Great Northern Railway Company, in the foregoing entitled cause; that he has read the foregoing answer to second amended complaint and knows the contents thereof, and that the matters and things therein stated are true to the best of affiant's knowledge, information and belief. That affiant makes this affidavit for and on behalf of said defendant, Great Northern Railway Company, for the reason that said defendant company is a corporation and none of the officers of said corporate defendant are within the County of Cascade, State and District

of Montana, wherein affiant is and resides and where this affidavit is made.

I. PARKER VEAZEY, Jr.

Subscribed and sworn to before me this 14th day of February, 1913.

[Seal]

R. B. NOONAN,

Notary Public for the State of Montana, Residing at
Great Falls, Cascade County, Montana.

My commission expires Nov. 18, 1915.

Filed Feb. 15, 1913. Geo. W. Sproule, Clerk.

[23]

Thereafter, on February 27, 1913, Reply was filed herein, as follows, to wit: [24]

*In the District Court of the United States, in and for
the District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
et al.,

Defendants.

Reply.

Now comes the plaintiffs and for reply to defendants' answer to the second amended complaint, admit, allege and deny, as follows:

I.

Denies each and all of the allegations of said second separate answer so called.

WHEREFORE, plaintiffs renew their prayer for judgment as in their complaint prayed.

R. O. LUNKE,

WALSH & NOLAN,

Attorneys for Plaintiffs. [25]

State of Montana,

County of Lewis and Clark,—ss.

C. B. Nolan, being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff in the foregoing entitled action; that he has read the foregoing replication and knows the contents thereof and the same is true of the best of his knowledge, information and belief;

That the reason he makes this verification is because the plaintiffs are absent from the County of Lewis and Clark, wherein affiant is and resides.

C. B. NOLAN.

Subscribed and sworn to before me this 18th day of February, 1913.

[Seal]

J. R. WINE, Jr.,

Notary Public in and for the State of Montana; Residing at Helena, Montana.

My commission expires November 13, 1914.

Filed Feb. 27, 1913. Geo. W. Sproule, Clerk.
[26]

Thereafter, on July 2, 1914, the Verdict of the jury was filed herein, as follows, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
and JOHN HAMILTON,
Defendants.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiffs and against the defendant, Great Northern Railway Company, and assess their damages in the sum of \$8,000.00 Dollars.

NELSON STORY, Jr.,
Foreman.

Filed July 2, 1914. Geo. W. Sproule, Clerk.
[27]

Thereafter, on July 2, 1914, Judgment was duly entered herein, in the words and figures following, to wit:

*In the District Court of the United States in and for
the District of Montana.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
and JOHN HAMILTON,
Defendants.

Judgment.

The above-entitled cause coming on to be heard on the 30th day of June, 1914, R. O. Lunke, Esq., and Messrs. Wash, Nolan & Scallon appearing as counsel for the plaintiffs, and Messrs. Veazey & Veazey for the defendant, Great Northern Railway Company, a jury of twelve persons was regularly impanelled, charged and sworn to try said action. Whereupon witnesses on the part of the plaintiffs and defendant, Great Northern Railway Company, were duly sworn and examined. After hearing the evidence, the arguments of counsel and the charge of the court, the jury retired to consider of their verdict, and thereafter on the 2d day of July, 1914, returned into court their verdict in favor of the plaintiffs and against the said defendant, Great Northern Railway Company, and assessing the plaintiffs' damages at the sum of Eight Thousand (\$8,000.00) Dollars.

Wherefore, by virtue of the law and by reason of the premises aforesaid, on motion of C. B. Nolan, Esq., one of the attorneys for the plaintiffs, it is ordered and adjudged that the plaintiffs do have and recover of and from the defendant, Great Northern Railway Company, the sum of Eight Thousand (\$8,000.00) [28] Dollars, together with their costs herein, taxed at \$398.70.

Judgment entered July 2d, 1914.

GEO. W. SPROULE,

Clerk.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 2d day of July, A. D. 1914.

[Seal]

GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed July 2d, 1914. Geo. W. Sproule, Clerk.
[29]

That on September 7, 1911, the defendant Great Northern Railway Company filed herein its Bill of Exceptions to the order of the Court allowing amendment to the original complaint, said Bill of Exceptions being as follows, to wit: [30]

*In the Circuit Court of the United States, in and for
the District of Montana.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and JOHN HAMILTON,
Defendants.

Bill of Exceptions [to Order Allowing Amendment of Complaint].

BE IT REMEMBERED, that this cause came on regularly for trial upon the complaint of the plaintiffs, the amended answer of the defendant Great Northern Railway Company thereto and the reply of the plaintiffs to said amended answer. That said complaint was and is in the words and figures as follows, to wit: [31]

*In the District Court of the Twelfth Judicial District
of the State of Montana, in and for the County
of Valley.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and JOHN HAMILTON,
Defendants.

Complaint [in Bill of Exceptions].

The plaintiff above named complains of the defendants, and for cause of action alleges:

I.

That at all times hereinafter mentioned the defendant Great Northern Railway Company was and now is a corporation organized and existing under the laws of the State of Minnesota, and at all of said times owned and operated a line of railway, running across the State of Montana, and across Valley County, in said State, and at all of said times owned,

in connection with said railway, what is known as its right of way.

II.

That on the 18th day of April, 1909, and for more than a month prior thereto the defendant John Hamilton was in the employ of the defendant company as section foreman, and as such section foreman had supervision and control of that portion of the railway and right of way of the defendant company, more particularly described as follows: That portion of said railway and right of way between sections 1 and 12, Township 27, North of Range 58 East of the Montana Meridian in Valley County, [32] Montana, and as such section foreman it became and was his duty to abate on said right of way so under his control any nuisance, public or private, that might exist thereon.

III.

That on the said 18th day of April, 1909, and for more than a month prior thereto, there crossed said railway and said right of way a public highway, regularly used as such by the traveling public.

IV.

That the defendant company, so owning said right of way, and the defendant John Hamilton so in the employ of said defendant company as its section foreman for more than a month immediately preceding the said 18th day of April, 1909, placed and negligently permitted and allowed to remain on said right of way, at and near where said public highway crossed the same, the carcass of a horse, which said carcass so remaining there became and was a public

nuisance, and so remaining there in close proximity to said highway became and was an object likely to frighten teams driven on said highway, all of which the defendants well knew, or, in the exercise of reasonable diligence, should have known.

V.

That on said 18th day of April, 1909, one Nettie Ennis, then and there the wife of the plaintiff Herbert L. Ennis, and then and there the mother of the plaintiff Guy W. Ennis, had occasion to use said highway, and, so using it, was riding in a buggy to which was attached a team of horses, which said team was driven by one John Bigelow, and which said team was then and there, and at all times, gentle and tractable.

VI.

That said team being so driven, as aforesaid, when at and near the point on said highway near where said carcass was, [33] became frightened by said carcass and shied at same, and so becoming frightened and so shying, started to run away, and so starting, the said Nettie Ennis was thrown violently from said buggy and against a barb wire fence, and so being thrown she received internal injuries to her kidneys and other internal organs and also received bruises and wounds to her body, from which injuries, bruises and wounds she thereafter died.

VII.

That by the death of the said Nettie Ennis, the plaintiff Herbert L. Ennis has been deprived of the comfort, society and association of his wife, and the said Guy W. Ennis has been deprived of the care,

supervision and attention of a mother, and both of said plaintiffs have been deprived of the services of the said Nettie Ennis, all to their damage in the sum of Twenty-five Thousand Dollars.

VIII.

Plaintiffs further aver that they are the only heirs at law of the said Nettie Ennis, deceased.

WHEREFORE, Plaintiffs demand judgment against the said defendants for the sum of Twenty-five Thousand Dollars (\$25,000.00), together with costs of suit.

R. O. LUNKE and
WALSH & NOLAN,
Attorneys for Plaintiffs.

(Duly verified.) [34]

BE IT FURTHER REMEMBERED, that by said amended answer the defendant railway company denied each and every allegation, matter and thing in paragraph 3 of the said complaint contained and denied that the road referred to in said complaint was a public highway. That at the trial of said cause plaintiffs sought to introduce evidence that for more than four years prior to the 18th day of April, 1909, there crossed said railway and right of way a roadway used by the traveling public; that said use of said roadway was known during said times to the defendant railway company and that, during said period, the said defendant for the accommodation of the public so using said roadway, as it crossed the right of way of said defendant constructed and maintained a plank crossing where said roadway crossed its tracks and erected and maintained at said cross-

ing a railway warning signal to the traveling public using said roadway, and constructed and maintained at said point cattle-guards and fences such as are maintained where public highways cross railroad tracks, and that, during all of said time, the defendant railway company knew that the said roadway so crossing the said track and right of way was used by the traveling public and was so used without objection and with the tacit consent of the said defendant company. That upon said trial the said defendant railway company objected to this evidence for the reason that the same was incompetent, irrelevant and immaterial and not within the issues raised by the pleadings in this case in that, and for the further reason that, it was alleged in the complaint that the road and crossing referred to was a public highway and that said facts sought to be introduced in evidence did not prove or tend to prove that said road was a public highway. That thereupon the Court sustained said objections and the plaintiffs thereupon applied to the Court for leave to amend the complaint by striking out from said complaint the allegation that said crossing was a public highway and by inserting in lieu thereof allegations of fact in accordance with the evidence so sought to be introduced by them, and showing that plaintiffs' ancestor Nettie Ennis was using said crossing at the invitation of said defendant company. That thereupon defendant railway company objected to the allowance of said amendment for the reason [35] and upon the grounds that thereby the plaintiffs sought to incorporate into said complaint a new cause of action not theretofore

stated or attempted to be stated in said complaint in that by said original complaint the plaintiffs charge that the place where said defendant's alleged duty arose to the plaintiffs' ancestor was a public highway and therefore the said defendant was charged with having violated duties alleged to have been owing by the defendant to the said ancestor by reason of her presence upon a public highway, whereas the amendment in question changed the place where the said defendant's duties were alleged to have arisen and charged the said defendant, not with violating any duties owing to persons upon a public highway, but charged the said defendant with violating duties owing by it to the said ancestor not upon a public highway but as a person invited by said defendant upon its premises.

Which objection was by the Court overruled and the plaintiffs given leave to amend said complaint accordingly; to which ruling of the Court, defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

And now, therefore, in furtherance of justice and that right may be done the defendant Great Northern Railway Company presents the foregoing as and for its bill of exceptions in this cause and prays that the same may be settled and allowed and signed and certified by the judge of the above-entitled court who presided at said cause when said ruling was made,

and said proceedings had, as provided by law.

VEAZEY & VEAZEY,
Attorneys for Defendant Great Northern Railway
Company. [36]

*In the Circuit Court of the United States, Ninth Cir-
cuit, District of Montana.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, et al.,

Defendants.

**Order Settling and Allowing Bill of Exceptions [to
Order Allowing Amendment of Complaint].**

This cause coming on regularly before the Court this day to be heard upon the application of the defendant Great Northern Railway Company for the settling and allowance of its proposed bill of exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of Court, and it appearing to the Court that said bill of exceptions was duly served upon the plaintiffs by service upon their attorneys within ten days after the ruling in said bill referred to was made and that within ten days after such service and within the time allowed by law or rules of Court for the service of amendments to said bill no amendments were served by the plaintiffs or their attorneys, and the matter of the settlement of said bill of exceptions coming on now regularly to be heard, it is now ordered that the foregoing bill of

exceptions be, and hereby is, declared to be a true bill of exceptions in said cause, and the same is hereby settled and allowed as a true bill of exceptions of said defendant Railway Company in said cause, and the same is now hereby certified accordingly to be such true bill of exceptions by the undersigned the presiding judge of said Court who tried said cause and who presided at said cause [37] when the ruling therein referred to was made and the proceedings therein set forth were had, and it is ordered that the same be filed nunc pro tunc as of August 8th, 1911, and be made a part of the record herein.

Dated this 7th day of September, 1911.

CARL RASCH,

United States District Judge, Presiding in Said Circuit Court.

Helena, Mont., Aug. 21, 1911.

Messrs. Veazey & Veazey,
Attorneys at Law,
Great Falls, Montana.

Gentlemen:

Your favor of the 17th inst. is at hand with copy of bill of exceptions in the Ennis case.

Very truly yours,

WALSH & NOLAN.

[Indorsed]: Filed Sept. 7, 1911. Geo. W. Sproule,
Clerk. [38]

That on May 3, 1914, defendant railway company filed herein its Bill of Exceptions to the ruling of the Court on motion to strike the first amended complaint, said Bill of Exceptions being as follows, to wit: [39]

In the District Court of the United States, District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, et al.,

Defendants.

**Order Settling and Allowing Bill of Exceptions [to
Ruling on Motion to Strike First Amended
Complaint].**

This cause coming on regularly before the Court this day to be heard upon the application of the defendant Great Northern Railway Company for the settling and allowance of its proposed bill of exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of court, and it appearing to the court that said Bill of Exceptions was duly served upon the plaintiffs by service upon their attorneys within ten days after the ruling in said bill referred to was made and that within ten days after such service and within the time allowed by law or rules of court for the service of amendments to said bill no amendments were served by the plaintiffs or their attorneys, and the matter of the settlement of said

bill of exceptions coming on now regularly to be heard, IT IS NOW ORDERED: That the foregoing bill of exceptions be, and hereby is, declared to be a true bill of exceptions in said cause, and the same is hereby settled and allowed as a true bill of exceptions of said defendant railway company in said cause, and the same is now hereby certified accordingly to be such true bill of exceptions by the undersigned, the presiding judge of said court, who tried said cause and who presided at said cause when the ruling therein referred to was made and the proceedings therein set forth were had, and it is ordered the same be filed nunc pro tunc as of April 15th, 1912, and be made a part of the record herein.

Dated this 3d day of May, 1912.

GEO. M. BOURQUIN,

United States District Judge. [40]

*In the District Court of the United States, District
of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, et al.,

Defendants.

**Bill of Exceptions [to Ruling on Motion to Strike
First Amended Complaint].**

BE IT REMEMBERED, That, heretofore, to wit,
on the 15th day of April, 1912, this cause came on

regularly for hearing upon the motion of the defendant Great Northern Railway Company to strike certain portions of the amended complaint herein and to strike said amended complaint herein, which said motion was heretofore duly and regularly served and noticed, and as so served, noticed and made is in words and figures, as follows, to wit: [41]

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and JOHN HAMILTON,
Defendants.

Motion [to Strike Amended Complaint or Certain Parts Thereof].

Comes now the defendant Great Northern Railway Company and severally moves the Court to strike from the amended complaint of the plaintiffs on file herein each and all of the averments and matters hereinafter set forth, upon the ground that the matter so sought to be stricken is redundant, surplusage, irrelevant and immaterial, and is not within the terms of the order permitting the original complaint herein to be amended, and, except as it is redundant, surplusage, irrelevant and immaterial, is unintelligible and uncertain and renders said complaint ambiguous, unintelligible and uncertain; that is to say:

By the original complaint the plaintiffs charged that the road crossing in question was a public highway and, upon the occurrence of the variance between the said allegation of said complaint and the proof offered at the trial failing to establish that said crossing was a public highway, the plaintiffs sought, and obtained, leave to strike from their complaint the allegation that said crossing was a [42] public highway, *the plaintiffs sought, and obtained, leave to strike from their complaint the allegation that said crossing was a public highway* and to amend said complaint by inserting allegations showing that the use of said crossing by the deceased and by the public was made with the knowledge and consent, and even by the invitation of the defendants, and it appears from said amended complaint that although if said allegations, so sought to be stricken, are stricken from the amended complaint, the said amended complaint would constitute a clear, forcible and intelligible statement of the facts which the plaintiffs conceive constitute their cause of action, and would clearly set forth the theory upon which the plaintiffs intend to proceed, that is to say: The theory that said crossing was not a public highway, but was a crossing which the deceased and the traveling public were using with the knowledge and consent, and by the invitation of the defendants; nevertheless, by the insertion of said matter so sought to be stricken, the said clear, forcible and intelligible statement of plaintiffs' alleged cause of action is rendered ambiguous, unintelligible and uncertain, for, by the insertion of said matter so sought to be stricken, it

cannot be ascertained from said complaint whether:

(1) The plaintiffs mean thereby merely unnecessarily and redundantly to repeat the allegations therein contained clearly and forcibly charging, as aforesaid, the use of said crossing by the public and defendants' knowledge and consent to such use, and its invitation to the deceased and to the public to use the same, in which case the said matter so sought to be stricken is redundant and surplusage and immaterial and does not add to the validity of the facts otherwise set forth in said amended complaint; or whether,

(2) The plaintiffs mean again to charge and again to seek to litigate that the crossing in question was a public [43] highway, in which event the said matter, so sought to be stricken, is inserted in said complaint without leave of Court and after plaintiffs had asked for, and obtained, leave to strike the same from the original complaint herein and to abandon the said allegation that the said crossing was a public highway and to allege the said use of the same with the knowledge and consent, and by the invitation, of the defendants, as aforesaid; or whether,

(3) The plaintiffs mean to charge that the said crossing was not, in fact, a public highway, but was a crossing used by the traveling public with the knowledge and consent, and even by the invitation, of the defendants, in which event the said matter so sought to be stricken is immaterial and does not add to the averments otherwise contained in said complaint or assert facts constituting any part of said alleged cause of action to recover the damages

for the neglect of a duty owing by the defendants to the deceased, as a person invited by the defendants, or licensed by the defendants, to use said crossing.

The following is the matter sought to be stricken, to wit:

All that part of paragraph III, reading as follows:

(1) "recognized as such by the defendants."

(2) "As a public roadway"

(3) "the defendants recognized the public use of the same."

(4) "the said defendants treated said roadway as if it were a public highway."

(5) The last sentence of said paragraph III reading as follows: "Plaintiff further avers that for more than three years preceding the 18th day of April, 1909, the county commissioners of Valley County assuming that said roadway was a public highway expended public money [44] in its maintenance and repair, so that said roadway would be fit and suitable for public travel, which fact the defendants well knew, or in the exercise of reasonable diligence should have known."

(6) The whole of said amended complaint upon the further ground that by said amended complaint the plaintiffs seek to state a new cause of action not theretofore stated or attempted to be stated in said original complaint, in that, by said original complaint the plaintiffs sought to state a cause of action for damages resulting from an alleged violation of duties owing by the defendants to persons upon a public highway, but by said amended complaint the plaintiffs seek to state a cause of action to recover dam-

ages resulting from an alleged violation of duties owing by the defendants to persons invited or licensed by it to use its premises.

VEAZEY & VEAZEY,

Attorneys for Defendant Great Northern Railway Company. [45]

BE IT FURTHER REMEMBERED: That the original complaint herein and the said amended complaint herein referred to in said motion are correctly and fully set forth in the Bill of Exceptions heretofore presented by defendant Great Northern Railway Company herein and heretofore settled, signed, certified and filed to the order permitting the original complaint herein to be amended, to which record thereof in said Bill of Exceptions reference is hereby made, and the same are, by this reference made a part of this Bill of Exceptions as fully and to all intents and purposes as if here set out at length.

BE IT FURTHER REMEMBERED: That, thereafter, said motion was duly argued by counsel for the plaintiffs and by counsel for the defendant Great Northern Railway Company and submitted to the Court for judgment and decision, and, thereupon, the Court overruled said motion to strike and the whole thereof, and each and every motion therein made by said defendant Great Northern Railway Company, the Court being of the opinion that the amendment does not intend to and does not allege, that the place of the accident was a public highway but only a roadway used by the public by the defendant company's license, acquiescence, permission or invitation, and plaintiffs' counsel having, at the

argument of said motion, disclaimed any intention to allege that the place of the accident was a highway, and having stated that the only intention of said allegations was to allege that the place of the accident was a roadway by the defendant company's license, acquiescence, permission or invitation.

The opinion of the Court in overruling said motion is as follows: [46]

*In the District Court of the United States, District
of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
et al.,

Defendants.

Herein the motion of defendant railway company to strike from the amended complaint is denied.

Memorandum [Opinion on Motion to Strike].

I am of the opinion the amendment is within the order allowing it. It is evident the amendment does not intend to and does not allege that the place of the accident was a highway, but only a roadway, open to and used by the public, by the defendant company's invitation, license or acquiescence. Nor is there any change of the cause of action. The gist thereof, both in the original complaint and in the amended complaint, was and is alleged to be an injury to a deceased person, causing death (the right to recover damages for which is claimed by plain-

tiffs), due to neglect of the defendant company in leaving on its right of way a dead horse, near a crossing place over said right of way. The fact that the original complaint alleged the crossing place was a highway, and the amended complaint alleges it was a way by invitation, acquiescence or license, does not show a change of the cause of action, though it may show a different character of duty owed, if any, and a different grade or quality of negligence permitted, if any.

April 16, 1912.

GEO. M. BOURQUIN,

Judge. [47]

To which ruling of the Court in overruling said motion in its entirety, and to each and every ruling of the Court in refusing to strike the said several portions of said complaint as prayed for in said motion, said defendant Great Northern Railway Company, by its counsel, then and there duly excepted, and severally excepted; which said exceptions were each then and there duly noted and allowed, and are each hereby preserved.

And, now, therefore, in furtherance of justice and that right may be done, the defendant Great Northern Railway Company presents the foregoing as and for its bill of exceptions in this cause and prays that the same may be settled and allowed, signed and certified by the Judge of the above-entitled court who presided at said cause when said rulings were made, and said proceedings had, as provided by law.

VEAZEY & VEAZEY,

Attorneys for Defendant Great Northern Railway Company.

IT IS HEREBY STIPULATED, by and between the parties plaintiff and defendant Great Northern Railway Company in the above-entitled cause, that the foregoing bill of exceptions is true and correct, and that the same may be settled and allowed, signed and certified by the judge of the above-entitled court, who presided at said cause when said rulings were made and said proceedings had, as provided by law.

Dated 29th April, 1912.

R. O. LUNKE and
WALSH & NOLAN,
Attorneys for Plaintiffs.

VEAZEY & VEAZEY,
Attorneys for Defendant Great Northern Railway
Company.

Filed May 3, 1912. Geo. W. Sproule, Clerk. [48]

That on February 15, 1913, defendant railway company filed herein its Bill of Exceptions to the ruling of the Court on motion to strike the second amended complaint herein, said Bill of Exceptions being in the words and figures following, to wit: [49]

*In the District Court of the United States, in and for
the District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, et al.,

Defendants.

**Bill of Exceptions [to Ruling on Motion to Strike
Second Amended Complaint].**

BE IT REMEMBERED, That heretofore—to wit, on the seventh day of January, A. D. 1913—this cause came on regularly for hearing upon the motion of the defendant, Great Northern Railway Company, to strike certain portions of the second amended complaint herein, and to strike said second amended complaint herein, which said motion was heretofore duly and regularly served and noticed; and as so served, noticed, and made, is in words and figures as follows, to wit: [50]

*In the District Court of the United States in and for
the District of Montana.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and JOHN HAMILTON,
Defendants.

**Motion to Strike [Certain Parts of Second Amended
Complaint].**

To Herbert L. Ennis and Guy W. Ennis, Plaintiffs
in the Above-entitled Cause and to Messrs.
Walsh & Nolan and R. O. Lunke, Esq., Their
Attorneys:

You and each of you will please take notice that the defendant Great Northern Railway Company, on Monday, the 16th day of September, 1912, at ten

o'clock A. M. on said day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled court at the city of Helena, Montana, will move the Court as set forth in the annexed written motion, which for purposes of notice is, by this reference, made a part hereof.

The foregoing motion will be made as an entirety, and also as a several motion as to each matter and thing sought to be stricken, and said motion as an entirety is, and said several motions are each, made and based upon the grounds and matters set forth in said written motion.

VEAZEY & VEAZEY,

Attorneys for Defendant Great Northern Railway
Company. [51]

*In the District Court of the United States, in and for
the District of Montana.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
a Corporation, and JOHN HAMILTON,
Defendants.

Motion to Strike.

Comes now the defendant Great Northern Railway Company and severally moves the Court to strike from the second amended complaint of the plaintiffs on file herein each and all of the averments and matters hereinafter set forth as the several and respective matters and averments hereby sought to be stricken, to wit:

1. All that part of paragraph III of said second amended complaint reading as follows, to wit:

“the county commissioners of Valley County, on proceedings taken for that purpose, undertook to lay out a public highway in said county, for use by the travelling public, and in said year took such steps in relation thereto that a certain roadway was laid out and established by said county commissioners, which.”

2. All that part of paragraph III of said second amended complaint reading as follows, to wit:

“Plaintiffs further aver that in connection with the laying out and establishing of said roadway, as aforesaid, and in connection with the proceedings so had, as aforesaid, by the said county commissioner, the defendant company granted to said Valley County, for use over its said right of way, a right of way for said roadway, which said right of way, so granted by said defendant company for such roadway, as it crossed the right of way and track of the defendant company, was approximately about sixty feet wide.” [52]

3. All that part of paragraph IV of said second amended complaint reading as follows, to wit:

“so attempted to be laid out, as a public highway, as aforesaid, was in said year opened for travel and public use, and so open for travel and public use.”

4. In paragraph IV of said second amended complaint, from the averment “and so opened and used extended to the town of Baineville” strike out the

words: "so opened and used."

5. All that part of paragraph IV of said second amended complaint reading as follows, to wit:

"since said roadway was so opened for travel, in said year, said roadway."

6. From the expression "as if it were a public highway" in paragraph IV of said second amended complaint, strike out the words: "if it were" and the word "public."

7. All of paragraph V of said second amended complaint.

8. All that part of paragraph VI of said second amended complaint reading as follows, to wit:

"after said roadway was laid out and opened, as aforesaid, and after said defendant company granted a right of way for the same across its said premises, as aforesaid."

9. All that part of paragraph VI reading as follows, to wit: "said roadway was opened, as aforesaid."

10. In paragraph VI of said second amended complaint, from the averment "a warning signal that a public crossing existed," strike out the word: "public."

11. All that part of paragraph VI of said second amended complaint reading as follows, to wit:

"and has in all respects, since the year 1906, treated said roadway as established across its right of way as if it were a regularly laid out public highway."

12. All that part of paragraph VII of said second amended complaint reading as follows:

“the said defendant company, when the said roadway was laid out and opened, as aforesaid, dedicated for public use, an easement for roadway purposes in the ground covered by said roadway, as it crossed its said right of way, and.”

[53]

13. All that part of paragraph VII of said second amended complaint reading as follows, to wit:

“and knew that the said roadway was so used by them as if it were a public highway.”

The foregoing motion is made as an entirety, and also as a several motion as to each matter and thing sought to be stricken, and said motion as an entirety is, and said several motions are each made upon the grounds following, that is to say:

I. The order heretofore made permitting the plaintiffs to amend their complaint was an order granting leave to the plaintiffs to amend an amended pleading after the sustaining of a demurrer to said amended pleading, and the same was made upon merely the oral *ex parte* application of the plaintiffs and without notice to this defendant, and without any showing by affidavit or under oath being made as to the right or propriety of said order being made, and without the Court having presented to it the resulting prejudice to this defendant, and the granting of said order, as a general order permitting said complaint to be amended without notice to this defendant or an opportunity to be heard, and without preserving to this defendant the right to show why said order should not be made and why the same would and does operate to prejudice the interests of this

defendant, and without imposing terms upon the plaintiff, and particularly without the imposition of any costs upon the plaintiff and without awarding costs to this defendant in the light of the facts set forth in subdivision two hereof, if permitted to stand, would constitute an abuse of discretion to the prejudice and disadvantage of this defendant, for that, as shown by the facts set forth in subdivision two hereof, the facts and things which the plaintiffs, by said second amended complaint, and especially by the said portions thereof sought to [54] be stricken, now seek to litigate with this defendant have already been litigated between the plaintiffs and this defendant, and by said order and by said second amended complaint remaining on file herein the plaintiffs are again permitted to litigate said matters which have been already heretofore decided adversely to them, and which they have conclusively elected not again to litigate and which they have conclusively elected to abandon and to litigate which they are estopped, and this without the imposition of the costs of the previous trial, or upon any terms whatsoever protecting the rights of this defendant.

II. By said second amended complaint the plaintiffs seek again to litigate matters, facts and things heretofore, at the trial of this cause before the Court and a jury, once already litigated between the plaintiffs and this defendant and determined adversely to the plaintiffs, and by said second amended complaint the plaintiffs seek again to litigate matters, facts and things, which by reason of the facts hereinafter set forth and appearing of record herein, the plaintiffs are now es-

topped from litigating, and by said second amended complaint the plaintiffs seek again to litigate matters, facts and things which they have heretofore conclusively elected not to litigate with this defendant, and which they have conclusively elected to abandon, that is to say:

This cause was heretofore tried before the Court and a jury upon the original complaint of the plaintiffs, the amended answer of this defendant thereto and the plaintiff's reply to said amended answer. Said original complaint alleged that the roadway therein referred to (being the roadway referred to in second amended complaint herein) was "a public highway," and that the same was "a public highway regularly used as such by the travelling public," and this defendant by said amended answer denied said allegations and denied that the roadway in question was a public highway. At the trial of said cause before the Court and a jury, the plaintiffs sought to introduce evidence in support of said averments of said original complaint that said roadway was a public highway, and the question as to whether or not the said roadway was a public highway was one of the matters and things which were litigated at said trial, and which the plaintiffs sought to prove and which the defendant sought to disprove by evidence adduced at said trial. At said trial, [55] in support of said averments of said original complaint, the plaintiffs sought to introduce evidence that, for more than four years prior to the 18th day of April, 1909, there crossed the railway referred to in said original complaint (being the railway referred to in

said second amended complaint) a roadway used by the travelling public, and that said use of said roadway was known during said times to the defendant company, and that during said period the said defendant, for the accommodation of the public so using said roadway as it crossed the said right of way of said defendant, constructed and maintained a planked crossing where said roadway crossed its tracks, and erected and maintained at said crossing a railway warning signal to the travelling public using said roadway, and constructed and maintained at said point cattle-guards and fences such as are maintained at public highways across railroad tracks, and that, during all of said times, the defendant railway company knew that said roadway, so crossing said track and right of way, was used by the travelling public, and that the same was so used without objection and with the tacit consent of said defendant company. Upon the trial of said cause, however, this defendant railway company objected to this evidence for the reason that the same was incompetent, irrelevant and immaterial and not within the issues raised by the pleadings in this cause, in that, and for the further reason that, it was alleged in the complaint that the road and crossing referred to was a public highway, and that said facts sought to be introduced in evidence did not prove or tend to prove that said road was a public highway. Thereupon, at said trial, the Court sustained said objections and the plaintiffs thereupon accepted and abided by said ruling of the Court and did not seek to have the same reviewed, and they thereupon applied to the Court

for leave to amend the complaint by striking out from said complaint the allegation that said crossing was a public highway and inserting in lieu thereof allegations of fact in accordance with the evidence so sought to be introduced by them and showing that plaintiffs' ancestor, Nettie Ennis, named in said original complaint (and in said second amended complaint) was using said crossing at the invitation of said defendant, which said application by plaintiffs to amend their complaint was accordingly, over the objection of this defendant that the same constituted an attempt to state a new cause of action, by the Court granted. Thereupon the plaintiffs attempted to amend their said complaint in accordance with the said order permitting the same to be amended by filing herein their first amended complaint herein. Thereupon this defendant moved the Court to strike certain portions, and the whole, of said first amended complaint from the files upon the ground that said amended complaint was not within the order permitting the said original complaint to be amended, in that, in said amended complaint and the portions thereof sought to be stricken, the plaintiffs evidently meant again to seek to litigate the question whether or not the crossing in question was a public highway, and upon the ground that the plaintiffs were seeking to escape from their said election to abide by said ruling of said Court, and were seeking again to litigate the question of a public highway which had been determined adversely to them. Upon the argument of said motion to strike, plaintiffs expressly disclaimed any intention to allege that the

place of the accident referred to in said amended complaint (being the roadway therein and in said second amended complaint referred to) was a public highway, and stated that the only intention of said first amended complaint and of said portions thereof sought to be stricken was to allege that the place of said accident (being [56] the roadway in question) was a roadway used by the defendant company's license, acquiescence, permission or invitation. Thereupon the Court denied said motion to strike upon the ground that said amended complaint did not intend to allege, and did not allege, that the place of said accident (being the roadway in question) was a public highway, but only a roadway used by the public by the defendant company's license, acquiescence, permission or invitation. Thereupon this defendant demurred to said amended complaint and said demurrer was, by the Court, sustained, and now by said second amended complaint filed by the plaintiffs herein, and by the several portions thereof hereby severally sought to be stricken therefrom, the plaintiffs again seek to charge and again seek to litigate that the crossing in question was a public highway by being regularly laid out, as such, by dedication and by estoppel and in other ways known to the law, and again allege and seek to litigate the question as to whether or not the said crossing referred to in said second amended complaint, and in the prior pleadings herein, was a public highway. By said action on the part of the plaintiffs hereinbefore recited, however, and by electing at said trial not to stand upon said ruling of the Court, and by electing

not to let said cause go to final judgment upon said ruling of the Court, and by electing not to have the said ruling of the Court reviewed, and by electing to abide by said ruling of the Court and to conform thereto, and by applying to said Court for leave to amend said complaint by striking out and abandoning the averments that said roadway in question was a public highway, and by applying to the Court for leave to amend said complaint by setting forth that said roadway was not a public highway, but a roadway used by the travelling public by the license, acquiescence, permission or invitation of said defendant company, the plaintiffs have conclusively elected that their remedy is not to allege, or seek to prove, that said accident referred to in said second amended complaint, and in said prior pleadings hereunder, occurred upon a public highway, or that the crossing in question was a public highway, and they have conclusively elected to abandon the theory that this action is based upon an alleged violation of duties said to have been owing by the defendant to persons upon a public highway, and by the facts aforesaid the plaintiffs have conclusively elected to proceed upon the theory that the roadway in question was a private roadway used by the travelling public by the license, acquiescence, permission and invitation of this defendant company, and not otherwise.

All of which said facts and proceedings more fully appear of record herein in the two bills of exceptions heretofore settled and filed herein, which are, by this reference, made a part of this motion as fully and to all intents and purposes as if incorporated

herein at length. But by said second amended complaint the plaintiffs now seek again to litigate the matters which, as aforesaid, have already been adversely determined against them, and which they have heretofore, as aforesaid, conclusively elected not to litigate, and which, as aforesaid, they have already conclusively elected to abandon, and which they are, by the facts aforesaid, conclusively estopped from asserting or litigating: that is to say: That the road-way in question was a public highway by proceedings being taken to lay out the same under the statute, by prescription, by dedication or by estoppel, or that the same was a public highway in any manner, or to any extent known to the law. [57]

The said motion as an entirety is, and each and every of said several motions herein embraced are each based upon the records and files herein, consisting of the plaintiffs' original complaint, the plaintiffs' first amended complaint, the defendant's motion to strike the same and portions thereof, the defendant's demurrer to said first amended complaint, the order overruling said demurrer, the order thereafter granting the plaintiffs leave to amend, the second amended complaint filed by the plaintiffs and this motion, and the two bills of exceptions heretofore filed herein by this defendant to the proceedings had upon the trial of said cause, and to the order denying said motion to strike said first amended complaint, and upon all the papers, facts,

matters and proceedings in said bills of exceptions set forth.

VEAZEY & VEAZEY,

Attorneys for Defendant Great Northern Railway Company. [58]

BE IT FURTHER REMEMBERED, that said motion was argued by counsel for the plaintiffs and by counsel for defendant, Great Northern Railway Company, and submitted to the Court for judgment and decision, and thereupon the Court overruled said motion to strike and the whole thereof, and each and every motion therein made by said defendant, Great Northern Railway Company, and, upon the argument of said motion, plaintiffs again disclaimed any intention to allege that the place of the accident was a public highway.

To which ruling of the Court, in overruling said motion in its entirety, and to each and every ruling of the Court in refusing to strike the said several portions of said complaint, as prayed for in said motion, the said defendant, Great Northern Railway Company, by its counsel, then and there duly excepted, and severally excepted as to the failure to strike out each of said several portions so sought to be stricken, which said exceptions were then and there duly noted and allowed, and are each hereby preserved.

AND, NOW, THEREFORE, in furtherance of justice, and that right may be done, the defendant, Great Northern Railway Company, presents the foregoing as and for its Bill of Exceptions in this cause, and prays that the same may be settled and

allowed, signed and certified by the Judge of the above-entitled court who presided at said cause when said rulings were made and said proceedings had, as provided by law.

VEAZEY & VEAZEY,
Attorneys for Defendant, Great Northern Railway
Company. [59]

IT IS HEREBY STIPULATED by and between the parties, plaintiffs and the defendants (Great Northern Railway Company), in the above-entitled cause, that the foregoing Bill of Exceptions is true and correct, and that the same may be settled and allowed, signed and certified by the Judge of the above-entitled court who presided at said cause when said rulings were made and said proceedings had, as provided by law.

Dated, January 22d, 1913.

R. O. LUNKE, and
WALSH & NOLAN,
Attorneys for Plaintiffs.
VEAZEY & VEAZEY,
Attorneys for Defendant, Great Northern Railway
Company. [60]

*In the District Court of the United States, District of
Montana.*

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY (a
Corporation), et al.,
Defendants.

**Order Settling and Allowing Bill of Exceptions [to
Ruling on Motion to Strike Certain Parts of
Second Amended Complaint].**

This cause coming on regularly before the Court this day to be heard upon the application of the defendant Great Northern Railway Company for the settling and allowance of its proposed Bill of Exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of court, and it appearing to the court that said Bill of Exceptions was duly served upon the plaintiffs by service upon their attorneys within ten days after the ruling in said bill referred to was made and that within ten days after such service and within the time allowed by law or rules of court for the service of amendments to said bill no amendments were served by the plaintiffs or their attorneys, and the matter of the settlement of said Bill of Exceptions coming on now regularly to be heard, IT IS NOW ORDERED: That the foregoing Bill of Exceptions be, and hereby is, declared to be a true Bill of Exceptions in said cause, and the same is hereby settled and allowed as a true Bill of Exceptions of said defendant railway company in said cause, and the same is now hereby certified accordingly to be such true Bill of Exceptions by the undersigned the presiding Judge of said court who tried said cause and who presided at said cause when the ruling therein referred to was made and the proceedings therein set forth were had, and it is ordered the same be filed and made a part of the record herein.

Dated this 15th day of Feb. 1913.

GEO. M. BOURQUIN,
United States District Judge.

Filed Feb. 15, 1913. Geo. W. Sproule, Clerk.
[61]

That on Jan. 10, 1913, an order denying motion to strike from second amended complaint was entered herein, as follows, to wit:

**[Order Denying Motion to Strike from Second
Amended Complaint.]**

*In the District Court of the United States in and for
the District of Montana.*

No. 960.

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et
al.,

Defendants.

Herein, the motion to strike from the second amended complaint is denied.

January 10, 1913.

GEO. M. BOURQUIN,
Judge.

That on January 14, 1915, defendant railway company filed its Bill of Exceptions herein to the rulings made at the trial hereof, said Bill of Exceptions being in the words and figures following, to wit:

[62]

*In the District Court of the United States in and for
the District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et
al.,

Defendants.

Bill of Exceptions [to Rulings Made at the Trial].

BE IT REMEMBERED, That this cause came on regularly for trial upon the issues arising only between the plaintiffs and the defendant Great Northern Railway Company, set forth in the second amended complaint of the plaintiffs, the answer of the defendant Great Northern Railway Company thereto, and the reply of the plaintiffs to said answer, before the United States District Court for the District of Montana, on the 30th day of June, 1914, the Hon. George M. Bourquin, the Judge thereof, presiding, said cause having been discontinued by the plaintiffs as to the defendant, John Hamilton. Messrs. Walsh, Nolan & Scallon and R. O. Lunke, Esq., appeared as attorneys for the plaintiffs, and Messrs. Veazey & Veazey, as attorneys for the defendant Great Northern Railway

Company. A jury of twelve persons was duly and regularly impaneled and sworn to try said cause. Whereupon the following proceedings, and none other, were had, and the following evidence, and none other, was introduced, to wit:

[Testimony of Herbert L. Ennis, One of the Plaintiffs, for Plaintiffs.]

HERBERT L. ENNIS, one of the plaintiffs, being first duly sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

Q. Mr. Ennis, what is your name?

By Mr. VEAZEY.—We object to the introduction of any evidence in this case, upon the ground that the complaint does not state facts sufficient to constitute a cause of action.

By the COURT.—The objection is overruled.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

I was born in 1850; am sixty-four years of age; live at the present time at Fairview, Montana. I am a dentist. In the spring of 1909 I lived near Bainville, Montana, about nine miles west of the eastern state line. That would be east of Culbertson. I was living on my homestead near Bainville. My family consisted of myself and my wife, living there together. I had a son living in Chicago. He had lived there seven, eight or nine years at that time—something [63] like that. My son was of age at that time.

(Testimony of Herbert L. Ennis.)

I think I had been living on the ranch about three years, and my wife had been living with me. She was forty-nine years old at the time of her death. Yes, sir, she was a woman of refinement. Yes, sir, she could play musical instruments. Yes, sir, my associations with her were companionable. Everything was pleasant. She had charge of the house, and looked after the business affairs of the house. Most of the work was done by her. Occasionally she had some help in some extra work. In the spring of 1909 I was away from home nights. I used to drive from the ranch to the office nearly every day. Sometimes I stayed there a day or two at a time, but I was at home most of the time. At that time I maintained an office at Mondak, about eight and a half miles east of my ranch. We were at that time in the process of proving up on the ranch.

I know of a roadway there going to Bainville. I first became acquainted with that road about three years prior to the accident, when I moved on the ranch there. At that time Bainville, or rather new Bainville, was about three miles west of my ranch on the line of the railroad. The main line of the Great Northern Railway Company ran through that portion of the country. The railroad ran right along the west side of my place there. I should judge that the road ran north from my house, probably one hundred and fifty or two hundred rods, and then crossed the track and followed the railroad track on the west side to Bainville. The road ran

(Testimony of Herbert L. Ennis.)

from my place west to Bainville, and from my place southeast to Mondak. Yes, sir, it was the road that was traveled by the public generally, as it went through the country there. Mondak was at one end and Bainville at the other—a distance of about ten and a half or eleven miles between the two. At Mondak the road connected with the road coming through Buford along down the railroad track to Williston, North Dakota. This road takes you into Mondak and then you can take any road you see fit. On the other hand, when you go to Bainville on this road, you could take a road out of Bainville to Culbertson. The road thus continues along there, going right through the country and doesn't stop.

[64*—2†]

At the time of the accident in April, 1909, I had been familiar with that road for four or five years. I lived there three years. I used it myself. It was the only way I could get out and go to Bainville from the east side of the track to the west side of the track crossing the railroad. Yes, sir, it was used by others who traveled through the country there. The plat which you show me is correct. It is a very good diagram.

Thereupon said plat was marked "Plaintiffs' Exhibit 1," and was offered and received in evidence without objection, and is by this reference made a part of this bill of exceptions.

Those red lines on the plat represent the driveway

*Page-number appearing at foot of page of original certified Record.

†Original page-number appearing at foot of page of Testimony as same appears in Certified Transcript of Record.

(Testimony of Herbert L. Ennis.)

from my place to Bainville. My place is at the east end of the red line. My house is on the east side of the track. It is marked the "Ennis house." We go from the house up to this crossing here. Then there is a road also which extends across the creek and goes east from there. The red parallel lines represent the driveway—the roadway that I have been speaking about. The railroad is represented on the plat by a single dotted line. This outside line, running along parallel with the dotted line, is intended to show the railroad fence. It is a road and so marked.

In going from my place to New Bainville we leave the house there and come up here to the crossing, as shown on the plat. We cross the corner there and then take the west side of the track and then follow the track to new Bainville. Those red lines also lead up to the road that crosses to the Central Security barn there, and from there on the drive extends on up to new Bainville. It is marked there.

When I first came there the crossing of the railroad track was directly west of my house, probably thirty rods west of my house. Then that crossing, after I located there, was closed and changed, and put up where the accident happened later. Before the time of the accident the crossing had been used at the point of the accident about two and a half or three years—probably two years and eight months. There were no bridges on this road from my house up to the Central [65—3] Security barn, but west on there to Bainville there were culverts that were

(Testimony of Herbert L. Ennis.)

put in and bridges. I saw county officials around that bridge during the time it was being put up. I saw the county commissioners there and the road supervisor. That was a very crude crossing there at first, but there were boxes put in on either side of the track, three and a half or four feet square, to conduct water from a big cut east of there down through into the creek, and then it was graded up over those boxes. I am referring to the crossing on the right of way of the railroad. The county road boss was there doing the work up to the approaches to the railroad track. I saw the county men working on the approaches to the road there, and the railroad men putting in the planking between the rails where the drive road crossed the track. The railroad company also banked it on the inside of the driveway. They also have a sign up there, "Railroad Crossing." I was present when these pictures were taken showing that sign. I was then with the photographer. Plaintiffs' Exhibit 2 correctly shows the crossing and the crossing sign. The crossing sign is right between the two poles and is marked, "Railroad Crossing."

Thereupon the said exhibit was offered and received in evidence, and is by this reference made a part of this Bill of Exceptions.

That photograph was taken probably three or four weeks after the accident. The fences on the east side of the road crossing are probably thirty feet from the road, and on the west a little further. I should judge that about sixty-five to seventy feet

(Testimony of Herbert L. Ennis.)

was the space between the fences on each side of the road where it crossed the track. The cattle-guards were placed right in where the fence came to the track. The cattle-guards were on each side, on the east and on the west.

During the time that I lived there and used this road, I saw work being done on it. I saw the road supervisor doing work on this road. I saw the railroad men fixing the approaches to the railroad track on the driveway across the railroad track. At different times I saw men working on the track there and on these planks. They [66—4] maintained the crossing. By they, I mean the railroad-men, the section-men.

About the time of the accident I had a man by the name of Bigelow working for me. He had been working for me prior to the accident in the neighborhood of six months. During that period he had been doing general farm work, team, and taking care of stock. At that time I had a team that was afterward used when the runaway occurred. I should judge that I had owned that team somewhere from about four to six weeks. Before that I had seen the team at Poplar, probably half a year prior to that time. During the time that I had the team myself I drove them a good deal myself. They were handled by Mr. Bigelow or anyone around the ranch. Anybody might drive them, and my wife drove them after she came home. They were well broken. Yes, sir, very well broken. As to whether or not they were gentle or not, I certainly wouldn't

(Testimony of Herbert L. Ennis.)

have let her drive them if they had not been gentle, if I had not considered them gentle. From my observation of this man Bigelow, he was a very good horseman.

It was right around the first of January, 1909, I learned of the existence of a carcass of a horse in the neighborhood of this crossing. When I first saw it, it was burned. It lay alongside of the track, I should judge about twenty-five feet from the track and from the rails, on the west side of the rails and east of the driveway which crossed the railroad track. It was inside the fencing of the crossing. I think the original right of way was one hundred feet on each side of the track. The carcass was inside the two fences leading from the outer right of way fences to the track. It was inside the fences leading to the track and it lay within about twenty or twenty-five feet of the rails.

I know Mr. Hamilton, one of the defendants. He was the section-boss on that portion of the road. I saw Mr. Hamilton pile ties on it and set it afire to burn it within three or four days after the carcass was first there. That would be right near the last of December or the first of January. The section-men were with him when [67—5] he did this. The carcass was frozen, and this burning simply burned the hair off the carcass, and that is about all the burning accomplished.

As regards how frequently I saw the carcass after that until the day of the accident, I used to cross there frequently going to Bainville. I always saw it

(Testimony of Herbert L. Ennis.)

there except during the winter when it was covered with snow more or less. Sometimes it would be seen plainly and sometimes it would be buried in snow, so that it would be pretty hard to see it. I think the last time I went across there prior to the accident was Thursday evening, if I remember right. The accident happened on Sunday, the 18th of April. During the time that the carcass was there I drove there frequently back and forth, crossed there. I had been driving those horses back and forth for about four or five weeks.

In going across there, no, sir, I didn't have any trouble at any time. The team didn't spirit up, no, sir. Well, they always noticed that carcass there after it began to get warm weather, after the snow was melted off. About the first of April was the first time that I noticed that there was any smell from that carcass. It grew stronger as it grew later in the month. At that season up until the first of April it was pretty cool, because the warm weather came on later, and later grew perceptibly stronger. By the Thursday before the accident the dogs and coyotes had worked on that carcass during the winter in frozen weather, and had eaten up the upper portion of it. The under side of it laid on the ground. That was pretty nearly all intact. The bones held up there and the skin was on the head and back and shoulders. That was pretty near perfect. The upper ribs, as it looked to me, had been eaten off. The meat had been eaten off of that portion. The ribs were still attached to the backbone, and you

(Testimony of Herbert L. Ennis.)

could see space plainly between them. There was no connection between the ribs. The outer portion of the body had been eaten away and the lower portion as it lay on the ground, the major portion of it, was there yet. At the time of the accident the carcass was not far from the traveled road. It was somewhere in the neighborhood of [68—6] twelve or fourteen feet from the driveway on the right-hand side as you go towards my house from Bainville, or on the left-hand side as you go from my house towards Bainville.

I have had considerable experience in handling horses all my life. Yes, sir, I have handled horses on the range. Yes, sir, I have encountered carcasses on the range when I was handling horses. As to whether or not a carcass like that would have a tendency to frighten horses, it always does.

I first learned of the injury to my wife about four o'clock in the afternoon of Sunday, the day she was hurt. I last saw her on Friday morning. She was then well. On Sunday afternoon at four o'clock when I saw her she had been injured by this runaway, and was in bed. She was paralyzed and had internal injuries. She did not recover from those injuries before she died, and remained paralyzed until her death. She was hurt on Sunday and died on the 22d, four days later.

My wife did the ordinary work of a wife around the house. She did the house work and looked after everything generally around the place. I would say she did a good deal of work. Yes, sir, she supervised

(Testimony of Herbert L. Ennis.)

the work of the men on the ranch—did that entirely. Yes, sir, she ran the ranch. She would have been forty-nine years old in December, after the accident. From a domestic servant standpoint, I would say that the labor and her services performed around the ranch would amount to at least five or six dollars a week. It could cost me that to hire a girl to do the house work. She died on the 22d of April at two o'clock in the afternoon. She never recovered the use of her limbs before she died.

Cross-examination.

There is nothing which has happened as the result of this accident which makes me feel that I cannot look back on the facts and give the jury an accurate account of what occurred, and as the result of the accident I am conscious of no bias against the railroad company. From my point of view it is merely a business suit between business men. [69—7]

My wife arrived at the ranch on Thursday evening from Chicago. She had been to Chicago on a visit, and got back on Thursday evening. She left for Chicago some time in December, or the latter part of November, about the twentieth of November of the preceding year, and she was away from the latter part of November up to Thursday, the fifteenth of April. She was visiting her son in Chicago. My son is between thirty-four and thirty-five. He has been working in the capacity of book work there in Chicago for ten years, from 1899 to 1910. He is independent and self-reliant. My wife used to make a visit down there to him every once a year or two

(Testimony of Herbert L. Ennis.)

years, just as it happened; sometimes in the summer, or later. I think this was the first visit she had ever made there after we settled on the ranch. That would be the first visit in three years, yes, sir. Prior to that she had been making visits to him every year or two. I would not go with her on these visits. I paid the expenses of those trips.

These red lines indicate the driveway. There was no fence along that road. It followed along the railroad fence. There was no fence, fencing the road from my place towards Mondak. The road was fenced across as you went through the farms. The main line of the Great Northern runs substantially east and west, but it curves near this crossing so that at the crossing it lays pretty nearly north and south. The crossing is right on the section line between Sections 11 and 12, and the crossing ran east and west. As soon as you get across that crossing going east there was a fence there with a gate in it, just beyond where the accident happened, and you couldn't go along on that road easterly without opening that gate. So also, as regards going into my ranch. You would have to open a gate. There was a gate across the road as soon as you got across the track, which would have to be opened in order to go easterly, and there was also a gate across the road in the fences at right angles to this gate, which would have to be opened to get to my place. The road, after crossing the railroad track, immediately ran up against the gates into the ranches, including my ranch. It went through the Hanson and then on to my ranch, and so down to

(Testimony of Herbert L. Ennis.)

Mondak, and along that [70—8] road there were gates all the way that you had to open when using that road. I spoke of that road as the main traveled road between Bainville and Mondak. There was a road west of my place, about two or three miles west of me; it ran from Bainville to Mondak. There were gates on that. In that country you can go anywhere, and the road was not fenced up. It is a new country. That other road was a main traveled road. Both of them were traveled by the public. There were obstructions in each all the way.

Q. What other road was there leading from your ranch to Bainville? A. None whatever.

Q. No other road?

A. Unless I went—well, I would go three or four miles north of Bainville and then go east three or four miles, and then come on the east side of my place.

Q. Wasn't there another road by which you could reach your ranch from Bainville?

A. From Bainville.

Q. That would involve a trip of a mile or two miles? A. No, sir.

Q. You would estimate that excess distance now at about six miles? A. Sir?

Q. You would estimate the distance at about six miles extra that you would have to go over the other road that you referred to leading to your ranch?

A. No, I wouldn't think that would be that much, probably four and a half or five miles.

Q. Do you remember on the previous trial being

(Testimony of Herbert L. Ennis.)

asked this question, and giving this answer? "Q. Was there a road extending about three-quarters of a mile from the railroad track northeast of the old Bainville station, which turned to go into your ranch, or from which a road led to your ranch? A. I could by making a trip through from, say, Lundquist's barn there, and going north of his barn, and [71—9] going north of his barn there around that way to his ranch, I could have gotten around there by going about two miles and a half or three miles." Do you remember that testimony?

A. I don't remember it, but it is practically all right in certain times of the year; but on account of high water or anything like that it would be impossible to get across the road on account of the creek. There is not a bridge there, and under favorable conditions we could get across that way.

My testimony at the previous trial was that I could have gotten around there by going about two and a half miles or three miles further.

Hamilton was the foreman there. Anderson was the road master. I knew them both prior to the accident for some time, for two or three years. I knew the agent at Bainville at that time, yes, sir. He lived right there at old Bainville, which was then about sixty rods from where this crossing was. That was where the old town was before it was moved up.

Friday morning was the last time I saw my wife. She had come there Thursday afternoon. I went after her the Wednesday preceding—Wednesday night—I expected her that night and she did not

(Testimony of Herbert L. Ennis.)

come, and Thursday night I think Bigelow went and got her. He drove her to the ranch and she was around the ranch with me until the following morning—Friday. I stayed there that night and left about eight o'clock the next morning. When I crossed the river the ferry-boat broke down and I was unable to get back across until Sunday afternoon.

I gave my wife no warning of the presence of that carcass there. If I had thought that that carcass being there would be an object likely to frighten that team to such an extent that it would run away, yes, sir, of course, I would have warned my wife.

The carcass was first found there towards the end of December or the beginning of January, 1909. I do not know of my own knowledge how it came there. I do not know whether the railroad company placed it there or somebody else placed it there, or whether it rested there by reason of some accident. I had been over that [72—10] crossing for two or three times a week on an average all the time the carcass was there. I noticed the effect of this carcass on the team. The team would notice this carcass when we crossed there. As regards whether I noticed that the carcass scared the horses along about the first of April, about the first of April the horses called my attention to it. The effect of that carcass upon the horses was that they would notice it and turn their heads toward it, but I always managed to get them across there. There always had been trouble. I would describe the carcass of an animal resting on the ground as a horse scarer.

(Testimony of Herbert L. Ennis.)

According to my testimony at the last trial, I had a stallion there that did not care to go across there at all. I could hardly get some horses across there at all. That was true always while the carcass was there when it was first killed. That was true at any time. We had a very big, powerful horse, not very well broken.

After the first of April I probably crossed there with that team three or four times. I never made any complaint to the railroad company or its employees of the existence of this carcass. I made no complaint to anyone. Prior to the accident I did not discuss with John Bigelow the effect of the carcass on the horses. I did not talk with him at all prior to the accident about my horses being skittish of the carcass.

Q. Do you remember testifying at the last trial as follows: "Q. Had you ever prior to the accident discussed with John Bigelow the effect of this carcass on the horses? A. Have I ever discussed it with him? Q. Had you ever, prior to the accident, discussed with John Bigelow the effect of this carcass on the horses? A. Why, I had spoken of the horses being skittish at it. We would talk that over."

A. In a way, we may have spoken about it there, about the horses noticing this carcass, and no doubt we did.

Q. And you talked it over?

A. I presume we did. After it began to smell there, I talked it over with him. [73—11]

Q. Do you remember being asked this question and

(Testimony of Herbert L. Ennis.)

making this answer: "Q. You had talked with him about the horses being skittish at this carcass and you told him your experience, about this team having been frightened, so that he knew at the time he was driving across that crossing that the horses would be frightened at this carcass, did he not? A. Certainly."

A. I don't remember my answer. That is four or five years ago. That is a long time to remember those things. It is a long time to remember these things that come up in the ordinary conversation between a man and myself.

We talked in a way as anybody would have talked with a man about those things. He knew that the carcass was there, and I knew that it was there. Certainly he knew the effect of the carcass upon the horses. No, sir, I did not warn him at any time about the horses and not driving across there. I considered him a competent horseman to drive a team.

Q. Why didn't you warn your wife of the presence of this carcass? A. Why did I not?

Q. Yes. A. I never thought of it.

As to whether the only reason why I never warned my wife of the presence of this carcass was because I never thought of it—why she was only home from Thursday night, and I had other things to talk about, and probably had other things on my mind. I only saw her Thursday evening at dark until Friday morning at breakfast. I didn't think of the carcass or anything about it. My wife was at home and we

(Testimony of Herbert L. Ennis.)

talked about other things. I don't remember what other things I had to occupy my mind. I don't remember whether, at the last trial, that I gave as a reason why I didn't warn her that I had other things on my mind. I don't know what my answer was at the last trial. I know I had it on my mind that I had to cross the river the next morning after she got there, and I went. As to whether I would have anything on my mind, other than my business, the business of running my ranch and my [74—12] dental work, I don't know anything about that. Yes, sir, I testified at the last trial as follows: "Q. What did you have on your mind? A. My work and my business. Q. What was your work and your business? A. Well, my farm work there and my dental business, and I had too much on my mind to tell a man."

I didn't keep any books as to what I approximately spent annually on an average for clothing for my wife. I don't remember whether I estimated it for you at the last trial or not. I usually gave her what was necessary for wearing apparel and for her own expenses. She had what was necessary for wearing apparel and anything she needed. I cannot state on an average how much I spent for clothing a year. I should judge probably two hundred and fifty or three hundred dollars. Yes, sir, she had everything she needed. I would say it was something like three hundred and fifty or four hundred dollars. I did not take trips with her annually; I didn't have the time. We went to different places occasionally. I would judge that I spent for her benefit for vacation pur-

(Testimony of Herbert L. Ennis.)

poses two hundred and fifty to three hundred dollars a year. That would not be in addition to clothing. I would not say that I spent for her on vacation expenses about one hundred dollars unless it was on traveling expenses or something of that kind when she was away from home. We will say it would amount to about one hundred dollars a year. I estimated at the last trial that it would cost about twenty-five dollars a year for literature and things of that sort that I bought for her. Probably more than that. We always had plenty of reading matter and things of that kind and music that we enjoyed.

I am not a traveling dentist. I have not been such for the last ten or fifteen years. I have always maintained an office. I had an office at Mondak for six years. I was going across the river on other business not connected with my profession.

I had confidence in Bigelow, the driver, yes, sir. I knew he drank, yes, sir. As to whether I knew that he drank heavily, he never did when he worked for me. He was working for me about six months. I had known him probably a year prior to that. As to whether I knew that [75—13] his general character may be described as a heavy drinking man, he was a man that drank occasionally.

By the COURT.—(Interrupting and without any objection by counsel for the plaintiffs.) Have you any plea of contributory negligence in here?

By Mr. VEAZEY.—Yes, sir.

By the COURT.—If you have no issue based on

(Testimony of Herbert L. Ennis.)

this I cannot see that it is competent, and worth while going into.

By Mr. VEAZEY.—There is an issue on intoxication of the driver in connection with the accident.

By the COURT.—Very well, proceed.

Q. Don't you know the instances yourself where Bigelow was drunk? A. Yes, sir.

Q. Now, what instance do you know of in that connection? Tell it to the jury, will you?

A. Well, one time he went up there with a saddle horse to Bainville. I don't know from my own knowledge that he was drunk then, though I would think he was.

Col. NOLAN.—I object to that. The question is whether he knows whether he was under the influence of liquor at the time, and whether it contributed to the injury complained of. This testimony is incompetent, irrelevant and immaterial.

By the COURT.—Yes, I will sustain the objection.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon noted and allowed.

By Mr. VEAZEY.—We offer to prove by this witness now on the stand that he knew that the driver Bigelow, prior to the accident, was a man given to the habitual use of intoxicating liquors to excess.

By Col. NOLAN.—I object to that, unless it is shown in that connection that he was incapacitated at the time in question by drunkenness.

By Mr. VEAZEY.—We disclaim any intention of proving by this [76—14] witness that he was in-

(Testimony of Herbert L. Ennis.)

toxicated at the time, but we offer this testimony to prove his habitual intoxication and to disprove the assertion of the witness that he had confidence in the driver Bigelow.

By the COURT.—I will sustain the objection. There is no issue framed on this as the Court sees it, and it is improper cross-examination.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

I was born April 22d, 1850. Since the accident for two years I have been unable to do anything. I was taken with an attack of infantile paralysis.

I knew George Anderson, the roadmaster of the Great Northern and the section foreman, Mr. Hamilton. At the time of the accident they were respectively roadmaster and section foreman, concerning the section where this particular crossing was.

Redirect Examination.

Yes, sir, my wife helped make expenses and kept hens. Yes, sir, she put up eatables around the house, preserves and things of that kind. Yes, sir, out of her hens and fowls that she handled, she made more than enough to pay her expenses and clothing. She was able to play musical instruments for my edification and enjoyment.

There was not to my knowledge any road going from Bainville to Mondak, without a fence across it. This gate on the road in question leading to the Hanson ranch and my ranch was about one hundred and fifty to two hundred feet from the house. This was

(Testimony of Herbert L. Ennis.)

the main road as it existed there and it ran through my place on the west side of it.

By Col. NOLAN.—Now, at this time, if the Court please, I will read the transcript of the testimony of the driver Bigelow, given on the former trial of this case.

Thereupon it was stipulated between the parties that the driver Bigelow was not now in the State of Montana, and was probably in the State of South Dakota, and that the transcript was a true transcript of what the witness Bigelow testified to at the former trial. [77—15]

Thereupon counsel for the plaintiffs offered to read said transcript of the testimony of said driver Bigelow, but the defendant objected thereto, on the ground that the testimony constitutes mere hearsay, and the witness himself must be called, and the inability to call him has not been sufficiently established, and on the further ground that at the time of the examination of the witness Bigelow at the last trial the defendant did not have impeaching testimony, and accordingly the witness was asked in the course of his examination in regard to impeaching testimony for the purpose of ascertaining whether any impeaching testimony would be available, and whether he would admit that impeaching testimony existed; but since the last trial the defendant has secured impeaching testimony and also upon the ground that the testimony of the witness as disclosed in the transcript is too unintelligible and uncertain to be understood, in that the witness referred in his testimony to a plat,

(Testimony of Herbert L. Ennis.)

and indicated the places referred to on the plat by such expressions as "here" and "there," pointing to the plat, and the meaning of such references are now lost.

Which objections were by the Court overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Thereupon counsel for the plaintiffs read to the jury the transcript of the testimony of the witness, John L. Bigelow, called and sworn as a witness on behalf of the plaintiffs at the last trial, as follows:

My name is John L. Bigelow. I am thirty-four years of age. I was in the employ of Mr. Ennis during the year 1909, some time about the last of March. I should judge I had been working for him very near a month before the accident, which occurred in April. I have lived in the neighborhood of that crossing up there about three or four years. Before that I was living at Bainville. I have lived in the neighborhood of Bainville about twelve years. Bainville would be about three miles from this crossing.

My business has been just all round workman there on the range a number of years. I have broken horses ever since I was big [78—16] enough to go out and handle them.

I have known this road crossing extending from the crossing there either way about three years. I did not know it before that. I would say two and a half years; I could not say exactly. I did not live

(Testimony of Herbert L. Ennis.)

either at old Bainville or new Bainville during the eleven or twelve years that I spoke of. I was working on ranches around through the country. For three years I lived in the neighborhood of this road. I went along through the country there before it was settled up—when there was nothing but just a trail through the country at that time. That road as it goes through there goes in past Mr. Ennis' place and on through. I traveled it two or three different times clear to Mondak. It was just a road through the country from one place to another through the country, and you would open gates. As regards where people traveled along there to go across from Mondak, there is a different road south from Bainville.

It would be pretty hard to say who uses this Ennis road. I know of people traveling along there, other than people on the Ennis ranch. During the past three years it has been the main road. It has been used by people from all around the country there. I could not fix it in miles very well. I have known of people from Mondak using that road. Mondak is fifteen miles from there. This country along on the side of the track there where Ennis lives in the direction of Mondak is not very thickly settled but the land is all taken up. The people there get their mail at Lakeside and at Bainville, and in going to Bainville from that portion of the country the people in this vicinity travel this road across the railroad there. As the road crossed the track in April, 1909, I think there was a crossing made between the tracks.

(Testimony of Herbert L. Ennis.)

There was a sign "Railroad Crossing—Lookout for the Cars." There were cattle-guards on the track on either side of the crossing, and there were fences extending from the cattle-guards back to the fences that ran along the line of the track.

I first saw the team that I had on the day of the accident about a month before that. It was just a mile this side of Culbertson. They were in the possession of Harry Cain for one, and I don't remember [79—17] the other fellow's name. At the time I went to work for Dr. Ennis he did not have the team then, but got them shortly afterward. During the time that I was with Dr. Ennis up to the time of the accident, I handled the team most of the time. I used them almost every day. As to whether or not the team was gentle or tractable, to my knowledge or in my judgment, they seemed to be as gentle as kittens. I hitched the team up on Sunday, and drove Mrs. Ennis to Bainville. I should judge it was about eleven o'clock when we started.

I first saw this carcass that caused the runaway in March. It was then just like any dead animal—the bones were there and part of the flesh. It was there on Sunday when I went to Bainville with Mrs. Ennis. As regards what its condition was then or whether it emitted any odor or not, well, I think it did. Yes, sir, I know it did. No, sir, I don't think there was any odor emitted by it in March when I saw it. As to whether in the month of April the odor was noticeable and strong, or whether it was simply slight, it was not very strong, but there was an odor there.

(Testimony of Herbert L. Ennis.)

When I was driving by there on Sunday, going to Bainville, I did not have any trouble going up with the team in going by the carcass. They shied out a little from it going up there.

As regards whether there is any difference, in so far as my ability to see the carcass is concerned in driving towards Bainville, as distinguished from coming from Bainville and towards the Ennis ranch, there is more of an object, and therefore it is easier to see it coming from Bainville. I had no trouble with the team when going to Bainville or about it shying that I spoke of.

In coming back we took the traveled road right by the railroad track. We left that road just at the Security Ranch and went to Miss Hanson's place. We went to Miss Hanson's instead of going along the road because the road by Miss Hanson's is a better thoroughfare. We stayed at Miss Hanson's just a few moments. Neither Mrs. Ennis nor myself alighted from the buggy.

As regards what took place after that, well, after we left Miss Hanson's place we drove down the road and there is a little [80—18] incline there. After we got down that we drove along for a little ways and a little piece of paper blowed in front of the horses and they kind of shied around it, and I got them settled down and going along as pleasant as any time—as any team could. And after you come there you get on another little incline and there was a steep rise right up just inside of this gate (indicating) and these other ridges (indicating) lies along the rail-

(Testimony of Herbert L. Ennis.)

road track and you can see this carcass shoot up that way (indicating), and then it is down again and up to another incline, and then on to the railroad track and then upon the other side. There was an approach on each side and just barely room enough for a buggy to cross it, and no chance to hold a team or anything else because you could not seesaw or do anything else with them.

After I got through the gate I had the team back in its normal condition and then we went to the crest of a little hill. That is where they saw the carcass, just as they come up over this raise (indicating). The wind was blowing from the south-east. The odor was noticeable in the morning going up, and I was watching my team when I got there so as not to let them scare. I had a tight hold on the lines there, using every precaution I could not to have them scare. On the crest of the hill there, and when the carcass came in sight they just made one lunge and shied around, and I pulled them back to the road and crossed the railroad track and they were running. Yes, sir, they were running very fast. I was not able to hold them, because I had no control over them at all. There was a thirty-foot bank right there and down over, and I had no chance to do anything, because it would be just like driving a team right along here (illustrating). Mrs. Ennis and I were still in the buggy. After I got across the railroad track with the team running in this way, I could not keep right ahead because the gate was fastened up. As to what it was that I then did

(Testimony of Herbert L. Ennis.)

there, and why I did it, the fences came up just like this (illustrating) or like this (illustrating). This corner would be right here (illustrating), and I had to steer my team to the corner of the fence. The gates were closed and I had no chance to do anything else except go right through [81—19] the fence, and I thought by steering them to this post I might stop them, and I could not go turning around the other way because of this creek going there with a thirty-foot embankment. There was no public bridge across the creek. The team hit this fence and upset the rig and throwed me through the fence and throwed Mrs. Ennis just to the edge of the fence, and she rolled in under the fence and left our buggy upset there. The team became detached from the buggy, yes, sir. I was hanging on to the lines this way (illustrating) with one hand and when I seen her laying there I let the team loose and ran over to her and asked her if she was hurt, and she said yes. She was unconscious at that time and could not move. She says, "Please loosen my clothes," and then I run up to Miss Hanson's house and got her down at once.

Cross-examination.

That spring I had driven by that crossing once or twice a week from sometime in March, when I went to work for Dr. Ennis. The first time I went across that crossing I had one of Mr. Lundquist's livery horses. I crossed with these horses concerned in this accident prior to the day of the accident. I used all horses. These were driven as much as any.

(Testimony of Herbert L. Ennis.)

I used these horses most of the time in driving over that crossing or in any light work.

As regards what effect I had noticed was produced by the carcass upon the horses during this period from time to time, or what they did at the crossing during this period, why, they would shy a little was all. That was all they did prior to the day of the accident. I did not expect as I approached this spot immediately prior to the accident that I was going to have a runaway. Q. You did not expect that the carcass would frighten the horses to such an extent that they would run away, did you? A. Yes, sir, I knew that they would be frightened, and I had a tight hold on the lines, but I did not expect no runaway, because I thought I was strong enough to hold them. No, sir, I did not expect those horses, as I approached that crossing immediately prior to the accident, to be frightened to such an extent that I would lose control over them. A carcass of a horse is an object which is likely to frighten a horse to such an extent that he will run away. Although it was an object likely [82—20] to frighten horses and cause them to run away I did not expect them to run away at this time, because I thought I was horseman enough to handle these horses.

After you get across the track there is a fence extending across about one hundred feet from the center of the track, and a gate to the south leading to the Ennis ranch, so that, after a person got across the track he could not get out of there except

(Testimony of Herbert L. Ennis.)

by opening that gate, or tearing down the fence. I had no room to turn. I couldn't turn. I turned out a little in order to hit this fence. I could not have turned the opposite way on account of the creek. It would not have been better if I had gone straight ahead and run into this wire. The buggy tipped over. The gate on the Hanson property would be somewhere in the neighborhood of one hundred to one hundred and twenty feet from the center of the track. Miss Hanson's house was about forty or forty-five rods from the gate which I opened on her property.

That piece of paper blew across the road between the house and the Hanson gate, about ten rods from the house. It just blew across the road, and went on down another part of the country. I did not open a gate on the Hanson property so as to get back on the road. The gate was not closed at all. The gate on the south or west side of the track was open. These horses took fright at this piece of paper like any ordinary horses, just kind of shied out to one side a little bit. I pulled them right up and they settled down and seemed to be as calm and cool as could be. It was not over two or three minutes that I took to calm them down and get them cool. It was about a minute until I had them down to a walk. I just pulled them down and got them on a walk.

As regards the road between Miss Hanson's house and the crossing, it comes up over a high bank there; that is, there is a creek down on this side of it (indicating), you see, and the road runs up

(Testimony of Herbert L. Ennis.)

over the hill, and I used it because it was a better road to travel. The other road goes down through those creeks. There is a hill in there just as you come up out of this creek and turn to go on the crossing. There is also a hill just before the Bainville road makes [83—21] that turn, just as you come up out of this creek. There is quite a little dip; I should judge about twelve feet. The Hanson road joins the Bainville road just about at that dip. You see you would be coming up this way (illustrating) and this other road runs right along here on the brow. It is a level road. The Hanson road joins the Bainville road on the top of that dip. The Hanson road joins the Bainville road at the Security Ranch. After you leave the Bainville road at the Security Ranch and go along the Hanson road the Hanson road then joins the Bainville road at the top of that little dip just as you come on the bank out of this dip. The Hanson road from the point where it leaves the old Bainville road near the Security Ranch to the point where it again joins the Bainville road has a little hill in there—not much of a one. That hill is about thirty or forty rods from where it starts in at the bank there where you come up the bank of the creek. I don't mean thirty rods from the point where it joins the Central Security Ranch. The foot of the hill to which I have reference on the Hanson road is about twenty-five rods westerly from the point where the Hanson road joins the Bainville road near the crossing. I should judge it would be about two rods from the foot of

(Testimony of Herbert L. Ennis.)

the hill to the top of the hill, so that from the intersection of the Hanson road with the Bainville road near the crossing, the bottom of the hill would be about twenty-five rods distant, and the top of the hill would be about two rods further, measured along the road.

This piece of paper blew across the road just after we were leaving Miss Hanson's house, just after we got where we started down this hill, just after we started down from the top. As regards whether that paper blew across my path at the top of the hill or the bottom of the hill, it would be just about the point of the hill starting down—just about at the top. I am sure about that. Those distances are correct to the best of my knowledge.

Yes, sir, I recall making some statement to the claim agent of the Great Northern Railway Company at Bainville on May 24th, 1909, in regard to this accident. As to whether I recall stating there that a small piece of paper on a bush fluttered considerably close to this [84—22] crossing, which frightened the team, and that this was at the bottom of the hill referred to, and that I just got the team quieted down when I reached the hill and approached the track, I would not say whether I said at the bottom of the hill or after we started down the hill. To the best of my knowledge it was just as we started down the hill. As to whether I recall stating that the piece of paper which frightened these horses simply fluttered on a bush—the paper was fluttering on a bush and blew across in front of

(Testimony of Herbert L. Ennis.)

the horses. As to whether I have testified to the effect that it was the blowing of the paper across our path that frightened them, well, it was fluttering there and then blew across. As regards which frightened them—the fluttering or the blowing across, it was the blowing across. The fluttering frightened them first and then the blowing across. A small piece of paper fluttering on the bush started them first.

As to whether a point twenty-seven rods from that crossing is close to the crossing, it is not a great ways away. I would understand that as meaning close to the crossing. That document bears my signature.

Thereupon there was offered and received in evidence a written statement, signed by the witness, and referred to in this testimony, reading as follows:

“A small piece of paper on a bush fluttered considerably close to this crossing, which frightened the team. This was about at the bottom of the hill referred to. I had just got the team quieted down when we reached the fill or approach to the track, and at that moment the wind blew the odor from the dead carcass right toward them, which frightened the team, so that they became unmanageable and ran away.”

As to whether, as I approached this crossing I did not expect the horses to be frightened to such an extent that they would get beyond control, I had a tight hold on them in case—I thought I had control over them enough to hold them. No, as I approached this crossing I did not expect the horses to be frightened

(Testimony of Herbert L. Ennis.)

to such an extent that they would get beyond control.

No, sir, I had not been drinking any that day. As to whether I am a drinking man, yes, sir, I take a drink. I was not drinking intoxicating liquors prior to that time to excess. [85—23]

The remainder of said transcript of the testimony of the witness Bigelow, as given at the last trial, read as follows:

“Q. Do you remember at any time—or did you at any time state to anyone at any place that it was this piece of paper which caused this runaway, and not this carcass?

By General NOLAN.—I object to that. This is a witness in the case, and I suppose if there is some evidence it was made in some particular statement.

By the COURT.—Sustained.

By Mr. VEAZEY.—We are not laying the foundation for impeachment, but are inquiring for evidence.

By General NOLAN.—Well, then, if you are not, the testimony is incompetent. Of course, any statements made by this man would be hearsay, except in so far as this statement would be contradictory to anything he has said on the stand here.

By the COURT.—I will allow him to answer the question.

Q. Did you ever at any time or at any place make any statements to anyone to the effect that this runaway had been caused by the horses becoming frightened at the piece of paper, and not by the carcass? A. No, sir.”

(Testimony of Herbert L. Ennis.)

Before the first question above set forth, beginning with the words, "Do you remember at any time, or did you at any time," etc., was read, counsel for the defendant advised the Court that defendant desired to withdraw said question, and to waive it, and advised the Court that if the witness were present, an impeaching question would be propounded, since impeaching testimony was not available, and defendant demanded that the witness be produced, in order that an impeaching question might be propounded, but the Court declined to allow said question to be withdrawn, or the answer thereto to be withdrawn. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon noted and allowed. And the Court likewise overruled the demand of the defendant that said witness be produced. To which ruling of the Court the defendant, by its [86—24] counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Likewise when that part of said transcript, containing the objection to said question and the Court's ruling sustaining the said objection, and the declaration by counsel for the defendant that defendant was not laying the foundation for impeachment, but was inquiring for impeaching evidence, was read, counsel for defendant advised the Court that defendant desired to withdraw said disclaimer that it was not laying the foundation for impeachment, and counsel stated that, at the time of the former trial, the defendant did not have any impeaching testimony, and

(Testimony of Herbert L. Ennis.)

was forced to inquire of the witness as to whether there was any, and could not call his attention to any particular statement or impeaching testimony, but that since then impeaching testimony had been procured, and defendant desired, therefor, to withdraw said disclaimer and to impeach the witness.

By the COURT.—The Court will not permit it. Now, we will hear what the witness has to say and bring that up later.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Thereupon, the testimony of said witness, as above set forth in said transcript was read to the jury.

[Testimony of H. L. Ennis, for Plaintiff (Recalled).]

H. L. ENNIS, being recalled, testified as follows:

Direct Examination.

After crossing the track and going from my place toward Bainville along the traveled road you turn at a sharp right angle and go down and follow along the railroad track, and right near where you turn and follow the railroad track you can turn and go straight up the hill toward Miss Hanson's. Miss Hanson's house is about forty rods from the railroad, and the road there goes up around the creek. There is a high cut bank which goes up around the creek, and this road goes up this bank and then back to where the old town of Bainville was. This road would extend from the crossing to a point to the south at an extreme distance of about forty-five rods, and then follows back to [87—25] the old road at

(Testimony of H. L. Ennis.)

the point where the old town of Bainville used to be. This road from Miss Hanson's house to the railroad track where they drove that Sunday is down quite a steep grade. Probably the railroad grade there is sixty feet lower than where her house is. It is sixty feet from her house down to the railroad track in that distance of forty rods.

After you cross the track from my place going to Bainville there are two roads by which you can reach Bainville—one road is towards Miss Hanson's house and the other turns at right angles to the crossing and follows the railroad track right along to Bainville. The two roads come together probably within twenty-five feet of the right of way fence. I don't think Miss Hanson's house is shown on the plat there. Yes (indicating) that is Miss Hanson's house (indicating a mark on the plat intended as a key to the plat). I have marked on the plat a line showing the road leading from Miss Hanson's house to the crossing (witness then marks on the plat a line from the crossing to a mark on the plat intended as a key showing the meaning of the mark on the plat, intended to indicate the Hanson house). The road from the Hanson house going down to the track was level for about five or six rods, and then you begin to break down hill. The gate that leads to the Hanson place is about twenty-five feet from where the two roads come together. There is an incline or depression beside the road where you break over in the right of way there, just before you come to the crossing in approaching the railroad track.

(Testimony of H. L. Ennis.)

There has been a big ditch there cut through, as I told you before, to let the water through from this cut. It is quite a drop down into the coulee; it was never graded out up there. This ditch is on the right of way of the railroad and runs parallel with the track and the road crosses it. In my judgment it would be forty or fifty feet from the railroad track. This photograph, Plaintiffs' Exhibit 3, shows the conditions of the right of way there. It shows you coming down the hill there, and it shows the break off into this ditch here right along here (indicating). Here is the crossing right there (indicating); that shows the ditch pretty plainly. The ditch and road are [88—26] shown in the photograph.

Thereupon said Plaintiffs' Exhibit 3, was offered and received in evidence without objection.

Plaintiffs' Exhibit 4 shows this big hill east of there, where the railroad comes through there, and slopes down from that on the west side to where they drove around. Plaintiffs' Exhibit 4 is taken about ten or twelve feet from the gate approaching the right of way.

Thereupon said Plaintiffs' Exhibit 4 was offered and received in evidence without objection.

The team shown in the picture is standing on the road coming down from the Hanson place.

Cross-examination.

I don't think the location of this house is indicated correctly on this plat, as I understand it. After examining the plat I now correctly locate the mark intended for Miss Hanson's house on the plat. The

(Testimony of H. L. Ennis.)

dotted road from the points "A" to "B" represents the road that passes the Hanson house, and not the other marks that I made. The dotted line from "A" to "B" was sketched on there at the time of the last trial. The Hanson road joins the Bainville road near where the old town used to be at the point "B." There was no gate there at all. The line which I sketched on in red in my direct examination, as the line showing the road from the crossing to the Hanson house, was on the wrong side of the track. You can just rub that out.

Thereupon the deposition of Mrs. Charles Allison, formerly Miss Alma Hanson, taken pursuant to stipulation hereinafter set forth, was read in evidence by the plaintiffs as follows:

[Deposition of Mrs. Charles Allison, for Plaintiff.]

Mrs. CHARLES ALLISON, being first duly sworn, testified in her direct examination by deposition, as follows:

Direct Examination.

I have been a resident of Valley County, at present Sheridan County, about nine years. I have known Dr. Ennis about eight years. I was acquainted with Mrs. Ennis in her lifetime. I was not present at the time of the accident in the month of April, 1909, but was [89—27] present a few minutes afterward. When I saw Mrs. Ennis she was right by the gate by the crossing. The crossing was just a few rods from my house. It was about three o'clock in the afternoon when I saw Mrs. Ennis. She was then conscious, but could not speak when I came down. Mr.

(Testimony of Mrs. Charles Allison.)

Bigelow, the driver, was with her there. I think he was the only one there when I went down there. Mr. Bigelow, the driver, first notified me. Mrs. Ennis was then just a few steps from the crossing; I should say about five feet. She was sitting on the telescope. I was with her all afternoon. She was then taken to her home about a quarter of a mile distant from the place of the accident.

I don't know how long this crossing had been there, where the accident happened. I am the owner of the land adjoining. Prior to the year 1908 I was the owner of the land on which a road was laid out, leading up to this crossing. I deeded that road or tract of land to the county for public road purposes. That road was used by people traveling to and fro through the country. I really don't know how long that road leading up to this crossing had been used for travel purposes up to the time of the accident—about two years anyway, in the least. I drove across that right of way where this crossing is, many times. I am not a good judge of distance, but I should say my house was about twelve rods from the crossing. There were cattle-guards on either side of the crossing. I don't remember whether there was any sign placed at the crossing, such as is usually used by the railroad company at railroad crossings, reading "Lookout for the cars!"

I was residing on my land during the winter and spring of 1909. While I resided there I noticed a dead carcass lying there that winter. I don't remember when I first noticed it. I know it was a horse,

(Testimony of Mrs. Charles Allison.)

and at the time of the accident had been there so long there was little left. I could not say how long. I crossed there almost every day. As regards how long prior to the accident I had occasion to cross this crossing and see this carcass, I crossed there almost every day. In crossing this crossing I noticed odor from the carcass. The odor emitted by the carcass was strong enough so that people crossing could notice it. The carcass was about three feet from the crossing where I [90—28] drove over it. The carcass was inside the fences maintained by the railway company. The carcass was about three feet from the rail, and about the same distance from the road. I don't remember just how long prior to the accident I had occasion to notice the odor from this carcass, but it was several weeks it was there. I did not notice the odor from this carcass when I was at my house, or too far away.

As regards whether I noticed the condition of Mr. Bigelow at the time he came up to the house to get me on that day, as to his being sober, or under the influence of liquor, he was perfectly sober as far as I could see. He was very much excited at the time he came to tell me about it.

I saw the team they were driving on that day. I knew this team and had occasion to ride behind this team prior to this accident. I think they were both bays. I drove behind the team with these parties. I drove with Dr. Ennis. The team seemed to be a gentle team. I do not think Mrs. Ennis ever used

(Testimony of Mrs. Charles Allison.)

this team. She came back shortly before the accident.

Cross-examination.

Thereupon, the defendant waived the cross-examination, but the plaintiffs insisted upon the reading of the same, and thereupon the defendant objected to the cross-examination being read in evidence under the stipulation, because, under the stipulation, the defendant had the right to waive the cross-examination, and did waive the same. When the deposition is offered at the trial and the defendant waives the cross-examination, it ceases to be cross-examination.

Which objection was by the Court overruled, and the plaintiffs were allowed to read the cross-examination in evidence. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed. Thereupon said cross-examination was read in evidence as follows:

I had known Mr. Bigelow before the accident for several years—I can't say how long. I did not notice any signs of intoxication on the occasion of the accident. I did not notice any signs of liquor of any sort. I could not say whether he is a drinking man. I don't know much [91—29] about it. As to whether I know his reputation in the community, as to whether he is a man who drinks considerably, and whether he drinks to excess, I don't know whether he drinks to excess. I have heard say he drinks some. I have not known of occasions when he has been un-

(Testimony of Mrs. Charles Allison.)

der the influence of liquor.

Thereupon, upon the defendant objecting to the following portion of said deposition, the same was first read to and passed upon by the court, to wit:

Q. Did Mrs. Ennis say anything to you at the time about his having had any liquor, or anything like that? A. No, she did not.

Q. Did she say anything after the accident about his having had any liquor? A. No, sir.

The defendant objected to said questions and answers, on the ground that the defendant had waived the cross-examination, and that therefore none of said cross-examination should be read in evidence, and in so far as the cross-examination has been admitted in evidence, this portion is a cross-examination as to a matter concerning which the defendant was forced to enter into, by reason of the improper questions asked in the direct examination, there being at the time the deposition was taken no one present who could rule on the competency of said testimony, and said questions in the cross-examination were asked merely for the purpose of developing anything that might have been said, or that is pretended to have been said by Mrs. Ennis, seeking to sound the reliability of the witness' testimony as regards the alleged conversations with Mrs. Ennis, and said cross-examination now becomes at most direct examination, and the portion referred to is hearsay and incompetent, and does not come within any exception to the hearsay rule.

Which said objection was by the Court overruled.

(Testimony of Mrs. Charles Allison.)

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

The carcass was about three feet from the rail and about three feet from the roadway. It was on the right-hand side of the road going [92—30] away from Bainville, and three feet from the wheel track in the road that would be nearest the animal. There were fences leading from, or near the rail, and away from the track. These fences were on each side of the road.

Mr. and Mrs. Flynn came by after the accident, and John Lundquist, and someone was with Mr. Lundquist, but I don't remember who he was. Also Miss Margaret Peterson, and Mr. Fred Swant. They came before we took Mrs. Ennis home—before we put her in the rig and took her home. Mrs. Ennis was conscious at that time. All the time she was there she was conscious. I stayed at the house until they took her to the doctor's, and she was conscious all the time she was there. I talked with her from time to time.

Q. And during those conversations did she say to you anything about Mr. Bigelow having been drinking that day?

Which said question was objected to for the reasons stated in the last objection.

Which said objection was by the Court overruled. To which ruling of the Court the defendant by its counsel then and there duly excepted; which said exception was thereupon duly noted and allowed.

A. No, sir, she did not.

I used this crossing almost every day. Sometimes

(Testimony of Mrs. Charles Allison.)

I would be driving and sometimes I walked across. I did not drive across very often. I drove both a horse and a team of horses. I noticed odor from the carcass when I drove across there, and the horses would always be frightened. As to whether, during the winter, coyotes and dogs had eaten up all the meat on the animal, and nothing but the bones were left, I would say there was nothing but the bones left at that time. I could not say the white bones; it had not been there quite that long. I would say just the bones were there. I would say that I crossed there while the carcass was there a dozen times and I noticed the odor of the animal every time I walked or drove across there. As to when was the first time that I drove across there and noticed the odor, or whether that was some time in the beginning of the year, I can't say because I don't remember. I know it was quite a while before that. I can't remember how [93—31] *how* many months the animal had been there. As regards approximating the number of months that I recollect that it was there during which I noticed the odor, and either drove or walked across there, I would say not more than two months.

I would say that my house is not more than twelve rods from that crossing. There are sixteen and a half feet to the rod.

Mrs. Ennis was in a critical condition all the time. She stopped at my house just before going over the crossing for about five minutes. She and Mr. Bigelow stopped just outside the house and talked with me only a few minutes. They did not go into the

(Testimony of Mrs. Charles Allison.)

house or get out of the buggy.

Thereupon the following questions and answers were first submitted to the Court for decision, as to whether they should be read in evidence, the defendant objecting to the same upon the same grounds hereinbefore set forth, and on the grounds that the same is hearsay, incompetent and irrelevant and immaterial, but said objections were by the Court overruled. To which ruling of the Court the defendant by its counsel then and there duly excepted; which said exception was thereupon duly noted and allowed. Thereupon said portion of said deposition was read in evidence to the jury as follows:

Q. There is nothing else you recall that would have any bearing on the accident, and no discussion you heard around Bainville as to Mr. Bigelow being responsible for the accident.

A. No, sir. I never have heard a great deal said about it.

Q. Have you heard any of these people, whose names you mentioned to us, refer to Mr. Bigelow as in any way responsible for the accident?

A. No, sir.

I saw the horses come by from the house, but I did not see them when they started to run away. These horses always picked up their feet. They were not slouchy. Their heads would be well up in the air. They were a good lively team. I never saw them shy at anything before. I should say they were ordinary western horses—about the same sort of horses that

(Testimony of Mrs. Charles Allison.)

I myself had been driving from time to time. [94—
32]

Redirect Examination.

About five minutes elapsed from the time Mrs. Ennis talked to me at the house to the time Mr. Bigelow told me of the accident. I had just gone back in the house. Miss Peterson was staying with me. She went down to the track with me. She was present during the conversation I had with Mrs. Ennis.

Recross-examination.

Thereupon the defendant waived the recross-examination, but the plaintiffs insisted upon the same being read, and thereupon the defendant objected to the reading of the recross-examination, for the reasons heretofore stated, as regards the cross-examination. Under the stipulation the defendant has the right to waive the cross-examination, and the witness was cross-examined for the purposes heretofore stated.

Which said objection was by the Court overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

As regards whether the presence of that carcass there was a thing that would probably and ordinarily frighten a horse, or whether it was rather extraordinary, I would say that it did always frighten all horses I ever saw cross there. As to whether I would expect it to frighten horses to such an extent as to make them run away, I was always afraid to cross there. I never drove any horses. Someone else

(Testimony of Mrs. Charles Allison.)

drove them for me. They did not run away on those occasions. I know that anybody that crossed there had a hard time to hold their horses. If a man has been driving along a road and has been dragging something behind him, and it leaves an impression in the dust, a horse is apt to shy at that, and any time a horse shies at something, if he feels he has control for a minute, he is apt to run away. In a city, if a horse is driven through the street and someone should wheel a baby carriage with a fancy top, it is possible that a horse might shy at that and run away. It is not true that all these things may frighten a horse, but that it is not to be expected that they should frighten him to such an extent that he would run away. I think a carcass would frighten a horse more than some other things. If, as shown by experience, many [95—33] teams were driving across there, and did not run away, I would not think then that a carcass would frighten a horse more than anything else, and I would not think it was likely that a horse driven across there would be so frightened as to run away.

I was not surprised when I heard of this accident. I had not warned Mrs. Ennis to look out for that carcass. She was a warm friend of mine. As regards whether, if I thought she was going to encounter any danger that day, I would have warned her; I did not think of it at the time. I did not think that there was going to be a runaway, because Mr. Bigelow was a good driver. If I had anticipated that there was any possibility of the horses running

(Testimony of Mrs. Charles Allison.)

away because of that carcass, I would have warned her. As to the effect of the carcass frightening horses at all, or to such an extent that they would probably run away, I think they would run away, unless the driver was on the lookout, and takes good care of them so they don't. If the driver is on the lookout and takes proper care, they would run away in some cases just the same, but it would not be expected. I draw the distinction between possibilities and probabilities.

In a way I was surprised when I heard of this accident, but then I was not, because I rather expected there would be an accident there, because I knew so many had trouble in crossing.

Redirect Examination.

At the times I crossed there and saw people cross there, I noticed people had trouble. I can see that carcass from my place. I noticed previous to this time people crossing there had trouble with their horses. I was not surprised at the accident, because I had been looking for something of this kind to happen, because of the carcass being there. When Mrs. Ennis was talking with me I did not think to speak to her about this carcass, because I had not seen her for some time and did not think of it at that time.

[Deposition of Mrs. Katy Meinhardt, for Plaintiff.]

Thereupon the deposition of Mrs. KATY MEINHARDT, taken at the same time, and pursuant to the same stipulation aforesaid, was read in evidence, as follows: [96—34]

Direct Examination.

I reside at Bainville, and have been a resident there seven years next April. I knew Mrs. Ennis in her lifetime. I don't remember seeing Mrs. Ennis in Bainville in the month of April, 1909. I saw her on the day previous to the time she was injured. She came to my house and asked me to drive out to Hubeners with her. We drove to Hubeners that day, about a mile and a quarter from Bainville. The trip took about an hour and a half. I drove the team there. I think the team was a light bay team. I drove the team back from Hubeners. We were there about an hour and a half. The team was perfectly gentle. The team had halters on. We put the halters on and tied them out at Hubeners. I don't remember whether we drove the team in from Hubeners with the halters on. Mr. Bigelow was waiting for us when we got back to Bainville. As regards his condition that day, whether he was temperate or under the influence of liquor, he was perfectly sober. Mrs. Ennis and Mr. Bigelow on our arrival at Bainville then went right out home as they were expected for dinner. They left me at Bainville and started home. It was about two and a half hours after that, that I heard that Mrs.

(Testimony of Mrs. Katy Meinhardt.)

Ennis was hurt. I went down the following day to see Mrs. Ennis.

Cross-examination.

Thereupon the defendant waived the cross-examination, but the plaintiffs insisted upon the reading of the same, and the same objections were made as to the reading of the cross-examination of this witness by the plaintiffs, after the same had been waived by the defendant, as were made to the reading of the cross-examination of the witness Mrs. Charles Allison.

Said objections were by the Court overruled. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Thereupon said cross-examination was read as follows:

I have known Mr. Bigelow for six years. There were no signs whatever of intoxication on his part. There was no sign that he had been drinking at all during the time Mrs. Ennis was absent. We were [97—35] about an hour and a half on this trip to the Hubener ranch. Mrs. Ennis asked me to take her out there. We were at home. Mr. Bigelow and Mrs. Ennis drove up with the team to the door and I got right in and we drove to Hubeners. We did not see him afterward until we came back. That represented about an hour and a half. When we came back we did not see any sign that he had had intoxicating liquor. I do not know whether he was a drinking man or not. I do not know his reputation in the

(Testimony of Mrs. Katy Meinhardt.)

community as to whether he drinks to excess at any time. I have heard his general reputation is that he does drink to excess at times. I could not say this has occurred frequently here in Bainville. I have not heard so.

Redirect Examination.

I am assistant post-mistress here at Bainville.

Recross-examination.

Thereupon the defendant waived the reading of the recross-examination, but the plaintiffs insisted upon the reading of the same, and the defendant objected to the reading of the same for the reasons set forth in its objection to the reading of the cross-examination of the witness, Mrs. Charles Allison.

But the Court overruled said objection. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Thereupon said recross-examination was read as follows:

As to whether I have ever seen him myself when he was intoxicated, I have not seen him when he was too drunk to walk. Yes, sir, I have seen him when he was intoxicated, and I would rather not be with him. I have not seen him in that condition very often; maybe four or five times within a year or so. I have seen him in that condition about four or five times altogether. I did not see him very often. I do not mean four or five times in the course of a year, but during my acquaintance with him. I have known him six years. As regards making any explanation or

(Testimony of Mrs. Katy Meinhardt.)

correction as regards your understanding that I said that these occasions when this man was intoxicated to my knowledge occurred four or five times within a year, I understood you to say how often, and I said four or five times during the time I knew him. During [98—36] the last year previous to the accident I had not seen him four or five times when he was intoxicated. I would not say that I had seen him more than four or five times previous to the year of the accident that he had been intoxicated. Using my best judgment, during the time that I had known him I had not seen him under the influence more than four or five times.

Redirect Examination.

I saw him under the influence of liquor only four or five times in the time that I knew him, which is six years. Previous to the time of this accident I had know Mr. Bigelow only about two years. During that time I had seen Mr. Bigelow under the influence of liquor possibly twice. One of these occasions was when he came in the door when we were in a restaurant on the other side. That is one time in particular that I remember. The other time was either at a dance or in a store. On the day when I came back from Mr. Hubeners, and he took the team from me he was perfectly sober. As to how close I was to him, he took the lines from me as I stepped out of the buggy. If he had been drinking I would have noticed it and would have been able to detect the odor of liquor, yes, sir. I paid no particular attention to him except that he was perfectly sober and every-

(Testimony of Mrs. Katy Meinhardt.)

thing was all right. I have known Dr. and Mrs. Ennis about six years and am a warm personal friend of theirs.

[Deposition of R. H. Sweetman, for Plaintiffs.]

Thereupon the deposition of R. H. SWEETMAN, taken pursuant to said stipulation, at the same time and place, as a witness on behalf of the plaintiffs, was read in evidence, as follows:

Direct Examination.

I reside in Sheridan County, and have resided there now for seventeen years. I was acquainted with Herbert L. Ennis and with Mrs. Ennis in her lifetime. I know the crossing across the railroad track near the Ennis farm. I can't say just the years that that crossing was used by the public, but it has been several years—six or seven years I would say.

Q. You may state whether or not you know of your own knowledge that a public road was laid out leading up to this crossing, if [99—37] you know?

Mr. VEAZEY.—That is objected to on the ground that it calls for the conclusion of the witness as to what is a public road.

By the COURT.—As I understand it, there is no claim that it was a regular public road and laid out as such. The objection is overruled. It will be made clear to the jury, so that there will be no misunderstanding about it.

A. I could not tell just the time, but it has been several years—five or six years.

In driving from my farm at Lakeside to Bainville

(Testimony of R. H. Sweetman.)

I used this road and crossing about the year Mrs. Ennis was injured. I had occasion to cross there and travel this road during the winter preceding the death of Mrs. Ennis. In crossing the railroad and going to Bainville, I noticed an object lying there along the railroad track. That was a dead horse lying there. I could not give any dates when I first noticed that animal lying there. It was sometime during that winter though. I should judge it was two or three times that I crossed over there while that animal was lying there. I was driving at these times. In passing over that crossing my horses noticed this carcass, yes, sir. I can't say as I noticed any odor emitted from the carcass. It may have been, but I can't remember noticing it. As to whether or not I had any trouble with my horses in crossing, on account of this carcass, I had trouble with one team. I was coming from the opposite side of the track, and just as the horses got on the track they seen it and stopped on the track, and I had to whip them to get them over the track. I should judge that this carcass was lying from fifteen to fifty feet from the roadway. I could not say the exact distance. I did not pay enough attention to it. I should judge that the carcass lay with reference to the crossing some twenty or thirty feet from the railroad track. It might have been a little closer, or a little farther. During the winter preceding this accident, I think I made about two or three trips during the time the carcass was there. As regards the flesh being removed from the bones, it was partly gone, I think. When I first seen

(Testimony of R. H. Sweetman.)

it, it was pretty much all there, but towards the last it had been [100—38] partly eaten up, I think. I was not present at the time of the accident.

Cross-examination.

To the best of my recollection the road had been used six or seven years up to the present time (1914). I don't know how long before April, 1909, it had been used. Prior to the accident a good many people used it, driving across during that winter of 1909. I could not say about the time the carcass was first there. It might have been there three or four months prior to the accident. I didn't pay no particular attention as to the dates. I don't remember whether I noticed any odor or not.

I had no runaway while I drove across there. I do not know of any runaways that have occurred there, other than this one in question. When I drove across there I didn't think about whether my horses might notice it. My team stopped as soon as their heads came above the track. They stopped and commenced to shy. I was on the railroad track and I urged them across. I could not say whether that was the first or the last time that I had driven across there when I had trouble with my horses. It wasn't the first, I am pretty sure. I had either been across with the team or had seen it by walking up the track. When I drove across there I didn't think about any expectation of the horses running away. Whenever I approached that crossing I did not anticipate that my horses would probably run away.

When a horse approaches an object you can't al-

(Testimony of R. H. Sweetman.)

ways tell whether it is going to frighten the horse or not. As to whether I would except a horse ordinarily probably to be so frightened by seeing or smelling a carcass as to run away, I would say they often do. I never warned anybody about that carcass. I don't know that if I thought anybody was going to get into trouble at that crossing, either Mrs. Ennis or Dr. Ennis himself, that I would have warned them. At the time I did think it was a kind of a scarecrow there for a time. Still I did not think much about it. I think that such a carcass is likely to cause a runaway any time. As to whether a runaway was likely and probable, or possible and may happen, yes it happens. Well, someone is pretty likely [101—39] to have a runaway at a place like that. As to whether it was merely a possibility or a probability that their horses would be so frightened that they would run away, I would say that they are pretty apt to. Of course, they would not all do it. The only runaway I know of is the one in question. As to whether I know of any other instances where horses have had runaways by being frightened to such an extent by a carcass, I have known of a good many where they have been frightened at one thing or another. I don't remember of any instance other than this one where horses have been so frightened at a carcass as to run away. I have lived in the country seventeen years. I have ridden a good many horses that I could not get near a carcass, and I have driven a good many that I could not get near there. I have

(Testimony of R. H. Sweetman.)

ridden a good many horses you couldn't get close to a carcass.

I have had no claims of my own against the Great Northern. I have had claims when I was doing business for my brother.

Redirect Examination.

The railroad track at the crossing is higher than the land right east of it. You come up a little grade to come on to it. As to whether, coming from the east, going towards Bainville, a horse wouldn't be able to notice this carcass until he had nearly reached the railroad track, I think the horse would be able to notice it with his feet just up on the track. As well as I can remember there is a kind of gradual slope there. It must be some eight or ten feet, I think, probably more, that the railroad track is higher than the land lying around it, and I should say the slope extended back thirty or forty feet. I did not notice particularly, but I know there is a kind of approach there to get to the track. As you approach the track to the east you go down a little just where the dirt has been scraped out to grade up the track. I would say that the carcass was on the west side. It would be either on the west or south, but the way the track runs it would be on the south.

Recross-examination.

As to whether dogs and coyotes had eaten up the meat, and just bones were left, I think the hide and a good deal of it was there. Dogs and coyotes had eaten it some. [102—40]

[Deposition of Charley Johnson, for Plaintiffs.]

Thereupon the deposition of the witness CHARLEY JOHNSON, as a witness sworn on behalf of the plaintiffs, taken at the same time and place, and pursuant to the same stipulation, was read in evidence, as follows:

Direct Examination.

I reside five miles northwest of Bainville, and have been a resident of Sheridan County since 1898. I was acquainted with Dr. Ennis and I met Mrs. Ennis in her lifetime.

I know the crossing leading to the Ennis ranch. In 1908 I was road supervisor for the old Valley County of which Sheridan County is now a part. In the year 1908 I performed work and labor on the road leading to the crossing on the Ennis Ranch. It was done in July, 1908, I think, but I would not be positive. Work was done by me on the approaches leading to this railroad crossing. I also graded up the track. The work I did there at that crossing was dirt work, scraping, grading up. As the time I graded it up there was a crossing there, but not a very good one. There were planks laid there between the rails. I could not say positively whether there was any cattle-guard there. I am not positive there was any sign placed there calling attention to it as a railroad crossing. It seems to me there was, but I am not positive on that point.

Q. You may state whether or not, while filling in the approaches to this crossing, whether you had any talk with the railroad officials with reference to said crossing.

(Testimony of Charley Johnson.)

Which question was objected to by the defendant as calling for hearsay testimony, and it does not show that the declaration was made in the course of the duties of the alleged official.

Which objection was by the Court overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

A. I had a talk with Mr. George Anderson. I think he was the roadmaster on the Great Northern. He wanted to know if I would stand for the planks and charge them to the county. I said no, not unless the County Commissioners authorize me to do so, and I refused to do so, and [103—41] he said, "Well, here goes." That is all. That was the substance of the conversation. Planks were afterward put in. I did not put them in. I was not there when they were put in. This work which was done by me on the road during 1908 made the road passable, so that people could drive over it.

I was not present at the time of the accident, and all I know about this work is what was done by me as road supervisor down there.

[Deposition of Charles N. Bain, for Plaintiffs.]

Thereupon the deposition of CHARLES N. BAIN, taken at the same time and place, pursuant to the same stipulation, as a witness on the part of the plaintiffs, was read in evidence, as follows:

Direct Examination.

I reside at Bainville, and have been a resident of Sheridan County ever since it was formed, and of

(Testimony of Charles N. Bain.)

Valley County prior to the division of Valley County into Valley and Sheridan Counties, for fourteen years. I knew Dr. Ennis and was acquainted with his wife in her lifetime.

I know the land near the Ennis ranch, and have known it for about thirteen or fourteen years. I know the crossing lying west of the Ennis Ranch across the railroad track. That crossing has been used by the public in going back and forth over the railroad track about six years from this spring. I think that crossing was first put in in the year 1907. There was a road on the south side of the track leading to this crossing. I think that road was put in in the spring of 1907. At that time I was living part of the time down there, and part of the time here at Bainville. I could see this crossing plain from my house. During the winter and spring of 1909 I saw a horse lying close to this railroad crossing. I can't say exactly when the horse first appeared or lay near that crossing, but it was in the winter. I was along the railroad there quite often, and noticed the horse there during the winter. I can't say how long the horse laid there—it was some time.

In going back and forth over the crossing I noticed odor from this carcass in the spring when it thawed. It thawed in April. During the month of April, 1909, as regards whether any odor was emitted from the carcass, it smelled pretty strong. [104—42]

I noticed they tried to burn it, but they did not get it burned up. They tried to burn it before it was thawed out. I was not present, but I saw Mr. Ham-

(Testimony of Charles N. Bain.)

ilton, the section foreman, throw some ties on it and light it. This was before it got warm weather, because it was not thawed out yet. They tried to burn it, but could not burn it—it was frozen too hard. I saw they had a fire down there, and saw afterward where they charred it. At the time they were trying to burn up this carcass I was up there around the house about a quarter of a mile. You could not see the carcass from the house.

I have had considerable experience in handling horses. As to whether or not the smell of a carcass lying beside a crossing or road would have a tendency to frighten horses driven by that carcass, I would say yes, any kind of smell, or anything lying down will scare a team. I could not state how long prior to the time of the accident when Mrs. Ennis was killed, I had noticed odors coming from that carcass. Most any time I came along I could smell it.

Persons driving over this crossing from the east would not have to drive up much of an incline. On the west there was a little bit of upgrade there. In April, 1909, there was a fence east of the crossing. If a party were driving from Bainville and going to the Ennis Ranch, after crossing the railroad track, he would turn to the right and there was a wire fence and gate that you went through, which wire fence and gate was about three or four hundred feet from the crossing. You could not very handy cross the railroad track going from Bainville to the Ennis Ranch without going through this fence or gate.

(Testimony of Charles N. Bain.)

Cross-examination.

That gate led into Miss Hanson's land, and you had to go through Miss Hanson's land to reach the Ennis Ranch. Miss Hanson's land lay on the west side and on the east side of the track. This gate would be on the east side of the crossing. There was no gate leading to the Ennis Ranch, except Miss Hanson's gate. Miss Hanson's Ranch joined the Ennis Ranch, and I don't think there was any fence between them. It was all in one field.

As regards the burning of the carcass, I saw the men down [105—43] there and saw where they had been trying to burn it. I was not present at the time, and do not know what they did or tried to do, but it was there afterward.

I could not say when that carcass was killed. I think it was in the early part of the winter. During that spring and winter I used to drive across there every couple of days or so. When I went there I noticed the carcass. There was no smell till spring. I first noticed the smell when it thawed out in April, or the last of March, and when I crossed then I would notice the smell. During that period when I noticed the smell I crossed there a couple of times a week, and sometimes every day or so. I should judge that anyway in the last two weeks in March and the first in April I crossed there four times a week at the least, and during that period I noticed the smell. Coyotes and dogs had eaten the carcass some.

Redirect Examination.

This crossing and the grade leading up to it was

(Testimony of Charles N. Bain.)

pretty narrow. The country around there is rough. A person driving over this crossing with a team has not very much extra room or road on each side of him, in case the team went to one side, no, sir. I would say the width of the roadway was sixteen or eighteen feet. When you get off the road to the east it was up hill, because there is a bank there, but they cut it down some.

[Deposition of Fred Swant, for Plaintiffs.]

Thereupon the deposition of FRED SWANT, a witness called and sworn on behalf of the plaintiffs, taken at the same time and place and pursuant to the same stipulation, was read in evidence, as follows:

Direct Examination.

I live in Bainville, and have lived there three years. Before then I lived in Iowa. I was road supervisor over this road, but did not have anything to do with this road, as road supervisor. When I was road supervisor I had supervision over roads around Bainville. I know this road leading to the Ennis Ranch. I had some work done on that two years after the accident. At that time it crossed the track and ran east, something about three quarters of a mile, and then turned south, and immediately east of the track and a distance of twenty or twenty-five [106—44] feet there was a bridge there constructed by the county. I could not say how much it cost. It was supposed to be a county job. I think the county let the contract for the bridge to other parties and they put it in there. I did not see the County Commissioners around there when the bridge was being put

(Testimony of Fred Swant.)

up. I have no personal knowledge as to whether the county's finances were expended for the payment of the bridge.

J. E. Paradis was road supervisor before me, and Charley Johnson was road supervisor before him. Charley Johnson was road supervisor at the time of the accident in 1909. In April, 1909, I was living at the Security Ranch. I should judge that the Security Ranch was about sixty rods from this crossing. At the time there were planks at the crossing and fences and cattle-guards, indicating that there was a crossing there. There was a sign there, reading "Railroad Crossing." I don't know who put that up. I have seen such signals elsewhere where there were crossings. This did not differ in any particular from the other signals.

This road was traveled by the public while I was living there. By the public I mean any parties—different parties—that would be driving along the road. It was not simply a road that was there for the accommodation of Mr. Ennis and one or two others that had ranches there. There was other parties that crossed there. There were cattle-guards there. A cattle-guard is an obstruction. It is not an obstruction higher than a railroad track, but it is something that would scare cattle—keep cattle from crossing the track; and extending from the rails on either side were fences extending back and leaving a space about sixty feet, I think, between the two fences.

There was a carcass there when I was working at

(Testimony of Fred Swant.)

the ranch. I came there in February, but I didn't see the carcass until along about March sometime, when I had occasion to go across the track there. Its condition did not exactly remain the same from the time I first saw it until I lost any knowledge of it. Nothing happened more than that the dogs and coyotes had been eating off of it to a certain extent and it had decayed. [107—45]

I couldn't say positively how recently before the accident happened on the 18th day of April, I saw the carcass there. I was just going back and forth over that crossing perhaps a week or so. It gave forth odor at times. A person crossing the track, if the wind was in the right direction, of course, could smell the odor, but if the wind was not in the right direction, perhaps you would not notice it. I should judge that the carcass lay about six or eight feet from the traveled roadway, and a little bit below the traveled roadway. I rode across there a few times. When I went across I was riding a saddle horse and he would always shy around the crossing there going over there. This horse was considered a very gentle horse.

[Testimony of John Hamilton, for Plaintiffs.]

JOHN HAMILTON, being first duly sworn as a witness on behalf of the plaintiffs, testified as follows:

Direct Examination.

I am one of the defendants. That is, I am one of the persons sued in this action. In the spring of 1909 I was section foreman and had been such for

(Testimony of John Hamilton.)

seven years. I know the crossing where this accident happened on the road going to Bainville. That crossing was not under my jurisdiction at the time. At the time I was acting as extra gang foreman. In the month of April, 1909, I was acting as extra gang foreman. A fellow by the name of Carl Addoms had that section then. I commenced acting as foreman with the extra gang some time in the summer. In January and February I was prospecting for gravel.

Q. Well, you were section foreman at the time this horse was placed upon the right of way there.

A. Yes, sir.

By Mr. VEAZEY.—There is no testimony as to the placing of the horse there.

By the COURT.—Well, it was placed there some way or other. Objection overruled.

(Witness continuing.) I started to prospect for gravel the same day the horse got killed. I saw the horse there that same day. It was discovered in the morning about seven or eight o'clock. The horse was then dead. I had been over that place the day before about half past [108—46] four or four o'clock. There was nothing there then. I made an examination of the horse the next morning at half past eight o'clock. The horse was cut on the hip. The skin was broken. The horse was about sixteen or seventeen feet on the outside of the rail. The horse lay between the space between the wind fence and the cattle-guard. I don't know exactly how far up. I

(Testimony of John Hamilton.)

would say it was about ten feet from the cattle-guards.

Trains passed through there in the night-time. During the night preceding the morning when I first saw this carcass on this roadway there were two passenger trains during the night and several freight trains—I don't know how many. I did not see any freight trains there myself during the night; I didn't hear any that I remember now. I didn't pay any attention to trains going through there. Under the schedule that worked there, there were trains scheduled to go through there in the night-time. I lived on my ranch about five hundred feet from the track. I don't remember hearing any trains go through there. I might have heard them and I might not.

It was not my duty to make any report as to animals killed by trains. I was not section foreman at that time. I had charge of something else. I was prospecting for gravel at that time. Another foreman was in charge of the section at that time. As section foreman it was my duty to report about cattle killed by the trains. I did not make any report about this horse being killed myself.

Q. You directed the other foreman to make a report that there was a horse killed by the railroad.

By Mr. VEAZEY.—That is objected to as incompetent, irrelevant and immaterial.

By the COURT.—Objection overruled. To show his conception of the situation there you can draw out that he directed the witness to report that the

(Testimony of John Hamilton.)

horse was killed by the railroad. If you want the other man's report you would have to get the original report.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon noted and allowed.

The horse was about fifteen, sixteen or seventeen feet from the outside rail. It lay in a deep hole there in between the right of way fence and the wagon track. It was about twenty feet from the traveled portion of the roadway, and ten feet from the cattle-guard fence. I don't remember whether the horse was lying parallel with the track or at right angles to the track. It seems to me its head was lying to the east; I ain't sure. There were some scratches on the skin of the horse. The skin was scratched off.

[109—47]

Cross-examination.

The section foreman put ties on the animal to burn it that same morning. I was on a saddle horse, and he came around on a hand-car, and he discovered the horse, at the same time he went around. The carcass was on the south side of the track, and on the road side of the fence.

[Testimony of George Anderson, for Plaintiffs.]

GEORGE ANDERSON, a witness called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination.

I am assistant roadmaster for the Great Northern, and held that position in the spring of 1909. As such

(Testimony of George Anderson.)

officer I had jurisdiction over the section foremen along my line of route. My duty is to look after the road in general, including the right of way fence and including cleaning up the right of way and keeping up the road fence. As to removing any obstructions that might be on the right of way, such as dead animals, and things of that kind, I bury them. I had jurisdiction over that too. I had no jurisdiction at all in relation to ascertaining how animals that were on the right of way got there. My jurisdiction would simply extend to disposing of the carcass after it got there.

I saw the carcass which is said to be the cause of the runaway in question. I saw it there different times between December, 1908, and the spring of 1909. My recollection would be that it came there in December. As assistant roadmaster I gave directions as to any disposition to be made of it. On account of the ground being frozen, and it being a hard matter to bury it, I instructed the foreman to burn it. I do not know how it came there. No claims come to me for animals killed by the railroad.

Cross-examination.

They burned it twice that I know of, and probably three times.

PLAINTIFFS REST. [110—48]

Thereupon, at the close of the plaintiffs' case, the defendant, Great Northern Railway Company, moved for a judgment of nonsuit as follows:

At the close of the plaintiffs' testimony, comes now Great Northern Railway Company, the defendant,

and moves for a judgment of nonsuit and dismissal on the merits, upon the testimony of the plaintiffs, on the following grounds:

1. The evidence introduced by the plaintiffs does not constitute facts sufficient to constitute a cause of action.

2. The evidence does not show that the railway company was in any manner responsible for the placing of the carcass upon the roadway in question. The testimony is undisputed to the effect that the carcass was on the roadway in question. For all that appears from the testimony, the animal may have been placed there by an agency for which the railway company is not responsible.

3. The evidence shows that the roadway in question was at most a roadway which the railway company permitted farmers to use, or others to use, or perhaps invited them to use, and under such evidence, if there were any negligence arising from the presence of that carcass which caused the runaway, the railway company would be under no duty to remove said carcass, and the roadway would be used subject to its concomitant perils, as in this case the persons are admitted to be expert horsemen and fully conscious of the effect of the carcass, and of the fact that such carcass existed there.

4. The uncontradicted evidence discloses that Bigelow was the driver of a private vehicle, and as such, was an agent of Dr. Ennis and of Mrs. Ennis, and as such, knowledge on his part would be knowledge on the part of Mrs. Ennis, and the proof shows that, even if the carcass had caused the runaway, and even

if the carcass was a perilous object, the driver testified that they knew that fact, and had seen that animal there for several months. It further appears from the uncontradicted evidence that, even under the assumption that the defendant was negligent, the defendant was not present, and the plaintiffs, or the driver, which is the same thing, by the exercise of [111—49] reasonable care, might have avoided the accident, and had the last clear chance to avoid the negligence, if any, on the part of this defendant. If the plaintiffs had the last clear chance to avoid the accident, as is shown by the proof, they could not thrust themselves, and the driver had no right to thrust Mrs. Ennis in a dangerous position, or on to a dangerous object in the road, and hence the negligence, if any, on the part of the railway company was not a cause of the accident, but a mere condition or circumstance, if such is the case, even accepting the plaintiffs' own theory of how the accident happened.

5. Lastly, the evidence does not disclose that the carcass in question, in any event, was an object which would be likely to frighten horses of ordinary gentleness to such an extent that they would run away, or that the runaway was a result which might reasonably be contemplated from the presence of the carcass there.

Which motion was by the Court overruled. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Mr. VEAZEY.—I do not know what your Honor's views as to the law are, but if your Honor desires any

(Testimony of William Gardner.)

authority as to the principle that the negligence of the driver of a private vehicle is imputed to the occupant, I can cite to your Honor a Montana authority.

By the COURT.—Oh, everybody knows that.

Defendant's Case.

[Testimony of William Gardner, for Defendant.]

WILLIAM GARDNER, being first duly sworn as a witness on the part of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I reside at Lakeside, Montana. I was acquainted with John Bigelow prior to the accident in question. I talked with him in regard to the accident on Mr. Hennessey's place in the granary. I first met John Bigelow eight years ago this spring. I do not remember what the substance of that conversation was. I know we were talking about this [112—50] case, but I don't know what the substance of the conversation was. I do not remember what he said at that time in regard to how the accident happened. I remember talking with Dr. Brockman in regard to the accident.

Q. Do you remember telling him what Bigelow told you in regard to the accident?

By Col. NOLAN.—We object to that as immaterial, whether he does or not. It is hearsay evidence of the rankest kind. If he did, seemingly he told him something he did not know anything about.

By the COURT.—I presume you are approaching impeachment.

(Testimony of William Gardner.)

By Mr. VEAZEY.—Not entirely. It might be considered impeachment in one sense, but it might be considered as substantive evidence. That is, it might be considered as a declaration made by a person who would be responsible for the runaway, in which event it is a declaration made by a person whose duty is in question in this case. The duty of the driver as a third person is a question in dispute in this case, and therefore, whatever would be evidence for or against the driver is evidence between the parties to this case.

By the COURT.—I don't understand it so. You might bring in the statements of servants. That happens every day. It might be admissible for impeachment if the plaintiffs propose to let it go in for that purpose.

By Mr. VEAZEY.—I have in mind also the question that was put to Bigelow in his deposition. We advised the Court at the time the testimony of Bigelow was being read, that at the time Bigelow testified, we had no impeaching testimony, and at the time his testimony was read we withdrew the disclaimer that the question was not asked Bigelow for the purposes of impeachment.

By the COURT.—You disclaimed any intention to impeach Bigelow when you put to him a question which was not a proper impeaching question. When you ask a witness if he made a statement you must ask him the time and the place and the person in whose presence it was made. You expressly said it was not for the purpose of impeachment. It is your misfortune that you did not have the impeaching

(Testimony of William Gardner.)

testimony at [113—51] the time Bigelow testified. It is no fault of the other side. Even the best cases are sometimes lost because testimony cannot be produced. The objection will be sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We now desire to renew our objection and exception to the reading of the testimony of Bigelow, as taken at the last trial, on the ground that its admission with the rulings of the Court forecloses us from introducing impeaching testimony, and the ruling of the Court requiring us to stand by our disclaimer after we withdraw it, and compelling us to have read in the evidence the impeaching question propounded to Bigelow, with the disclaimer, and then not permitting us now to withdraw the disclaimer, and introduce the impeaching testimony, is prejudicial to the defendant. Which said exception was thereupon noted and allowed.

Thereupon the defendant made an offer of proof in writing, as follows:

We offer to prove by the witness now on the stand that he talked to Bigelow in regard to the cause of the accident, but that the conversation occurred so long ago that he does not remember the substance of that conversation; that the witness does, however, remember that thereafter he talked with Dr. Brockman and told Dr. Brockman what Bigelow had told him (the witness) in regard to the accident. We offer further to prove by the witness that he told Dr.

(Testimony of William Gardner.)

Brockman only the truth in regard to what Bigelow told him (the witness).

This testimony is offered for the purpose of impeaching Bigelow in the first place. Secondly, and separately, as an admission by the driver, as one whose duty in this case is in question, and, therefore, as a declaration or admission made by the driver would be admissible for or against him, it would be admissible for or against the plaintiffs to this case, and in connection with this offer of proof an offer will hereafter be made through Dr. Brockman, now in court, to prove that that conversation, that Gardner had with Dr. Brockman, was to the effect [114—52] that Bigelow told Gardner that the runaway was caused by the horses becoming frightened at a piece of paper, and not by the carcass. This will connect up the proof and avoid any possible hearsay objection whatever, in that the conversation or statement of Gardner is under oath to the effect that he had a conversation and reported it correctly to Brockman, and Brockman, under oath, states what Gardner said.

By Col. NOLAN.—We object to that, for the reason that it is not proper impeaching evidence. The foundation is not laid, and if it is intended as impeaching evidence, counsel, at the time of the question which would make possible, or remotely possible, the presentation of this question, distinctly disclaimed any purpose to use it for impeaching evidence, and in the next place it is hearsay evidence of the most objectionable character.

(Testimony of William Gardner.)

Which said objection was by the Court sustained, and the offer of proof denied.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. What kind of a man was Bigelow prior to the accident, with reference to his habits in regard to intoxication?

By Col. NOLAN.—We object to that as improper, incompetent, irrelevant and immaterial.

Which said objection was by the Court sustained. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Col. NOLAN.—If your Honor will tell the jury where you exclude the evidence that they will not consider it.

By the COURT.—You may write your offer of proof if you think it will do you any good. We will give you time. It is not admissible under the issues in this case.

Thereupon the defendant, in writing, presented the following offer of proof:

We offer to prove by the witness now on the stand that the driver Bigelow was at all times prior to the accident addicted to the [115—53] habitual and excessive use of intoxicating liquors, and was, to the knowledge of the witness, usually under the influence of the excessive use of liquor, sufficient to make dull his senses, whenever, prior to the accident, he came to Bainville at any time prior thereto, for a period of

(Testimony of William Gardner.)

six months before the accident.

By Col. NOLAN.—We object to this, for the reason that, under the issues in this case, the evidence is incompetent. Also we object to it, for the reason that it has to do with conditions generally prevalent with reference to the particular matter in question.

Which said objection was by the Court sustained. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Witness continuing.) I drove across the crossing prior to the accident. Sometimes my horses would shy at anything lying on the road like any other horses. I don't remember seeing them shy there. I don't remember ever seeing them shy there, no, sir. I have handled horses all my life, more or less. I am fifty-five years of age. As regards my experience in the western country in riding and driving horses up to the carcasses of horses or other dead animals, I have passed them by, and had the horses shy by them, but I have never had any runaways. No, sir, I never heard, in my experience here, of a case where a horse ran away because he was frightened by the carcass of a horse, other than the instance in question where that claim is made.

Cross-examination.

Yes, sir, I have had a great deal of experience as a horseman. I have handled horses more or less all my life. I have not ridden particularly in this Western country, in Montana. I have lived in Iowa, Montana and Colorado. I don't recall any particular

(Testimony of William Gardner.)

carcass of a horse that I saw in Iowa the last time I was there. I do not remember in Iowa a single instance where I had occasion to run up against the carcass of a horse. A carcass of a horse would be an object at which a horse would shy. By shying I mean getting frightened and leaving the road. When a horse is frightened and leaves the road it does not always start to run. There might be several gaits it would strike getting around this animal. [116—54] When a horse is frightened at an object I wouldn't presume that it would always start to run. Sometimes when a horse shies you might have difficulty in getting it to move at all, yes, sir. Yes, sir, when you get a horse in that condition, not being disposed to turn back, you go by the object in spite of the animal. The object of the horse in shying under those circumstances is to get away from the object.

[Testimony of Charles Hubener, for Defendant.]

CHARLES HUBENER, being first duly sworn as a witness on behalf of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I reside at Medicine Lake, Montana. I formerly resided in Bainville, Montana. I knew John Bigelow prior to the Ennis accident. He had worked for me a couple of years as a bartender. I was running a saloon. I think Jack worked for me maybe a year and a half or a matter of that kind before the accident; I can't just remember, but it was over a year. It was before the accident. I think he left my em-

(Testimony of Charles Hubener.)

ploy just before he went to work for Mr. Ennis.

Q. What had you done in regard to the terms you offered him in connection with the saloon business?

Which question was objected to as immaterial, irrelevant and incompetent. Which objection was by the Court sustained. To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Did he afterward leave your employ?

A. No, sir, I discharged him.

Thereupon counsel for the defendant made the following offer of proof in writing:

We offer to prove by the witness now on the stand that for about a year previous to Bigelow's starting to work for Dr. Ennis, Bigelow was working for the witness in the saloon business as a bartender; that witness offered during said period to give Bigelow a share in the business if he would keep sober and not get intoxicated, but that Bigelow was nearly always during said period so intoxicated that he could not attend to the business, and finally the witness discharged him, because the witness had observed that he was an habitual drunkard. [117—55]

By Col. NOLAN.—I object to that as irrelevant and immaterial. Presumably he did leave at some time, because he subsequently worked for someone else.

By the COURT.—The objection will be sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said ex-

(Testimony of Charles Hubener.)

ception was thereupon duly noted and allowed.

(Witness Continuing.) I saw Bigelow on the day of the accident in town. I saw him in town. It seems to me that I first seen him out to my farm about a mile and a half east and a trifle north of Bainville. It occurs to me that he brought Mrs. Ennis out there to visit my wife. He was out there that afternoon, if I recollect right.

Q. Tell us what happened as regards you and Bigelow. What did you do?

By Col. NOLAN.—We object to that as immaterial, irrelevant and incompetent, what they did do.

Q. Did you drive back to Bainville with Bigelow?

A. Well, I ain't sure whether I drove back with him or not, but I was in town and drove in town that afternoon with Mr. Bigelow. He was in town during the time that Mrs. Ennis was at the farm visiting my wife, and perhaps making other calls down around there.

Q. Did you see yourself where he went?

A. Well, I was naturally meeting him around my place.

By Col. NOLAN.—We object to that “naturally.”

By the COURT.—Of course, the purpose of this is to show the condition of the man at the time he left town. It would not be admissible to show that. That would not be allowable as a part of the case of the defendant. Intoxication is not pleaded as a defense. The objection is sustained to this question. I don't see that that is an issue in this case.

To which ruling of the Court the defendant, by its

(Testimony of Charles Hubener.)

counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Did you see him shortly before he left on the return trip to the Ennis ranch? [118—56]

A. Yes, sir.

Q. What was his condition at that time relative to sobriety or intoxication?

By Col. NOLAN.—We object to that as incompetent, that being no issue in the case. The affirmative defense set up here in the answer has to do with a defense entirely independent of the condition of the driver on the day of the accident.

By Mr. VEAZEY.—Contributory negligence is expressly pleaded in the answer. The answer charges that the driver so negligently drove the team that the accident happened. That is clearly sufficient to authorize the introduction of evidence as to intoxication. Pleading the fact of intoxication would be pleading evidence. If you allege that an engineer so negligently drove his engine that a collision occurred, clearly intoxication of the engineer could be proved by the allegation.

By the COURT.—The objection will be sustained. There is no issue made as to the intoxication of the driver.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—If your Honor please, I have offers of proof which I imagine will take more than the time between now and twelve o'clock in order to

(Testimony of Charles Hubener.)

write them out, the time when the recess is taken, and I should like to have an opportunity to prepare them.

By the COURT.—Very well.

Whereupon a recess was had until one-thirty P. M. of the same day, when the trial was resumed.

By the COURT.—I suppose you are proceeding to an offer of proof of the condition of the driver at that time.

By Mr. VEAZEY.—In Bainville that morning.

By the COURT.—When did this accident take place?

By Mr. VEAZEY.—It took place in the afternoon.

By the COURT.—There is a plea of contributory negligence on the part of the driver. Of course, it would be imputed to the plaintiffs if he was negligent with his driving. Now, I think if you can show his [119—57] condition at the time, as distinguished from previous habits, that you will be permitted to show that—his condition at the time, not previous habits. His condition at the time, or so near that it would be reasonable to infer that it would continue to the time of the accident, and that it was a condition that would affect his driving, that, I think, would be proper to be shown.

By Col. NOLAN.—I was going to suggest that in connection with the proof, it might be a portion of the *res gestae*, but if they can show that he was drunk on this day, I was going to withdraw my objection, and let them try to do so. If they show that he was actually drunk, or if they can show that he was drunk

(Testimony of Charles Hubener.)

on the day in question, that will be all right, but I don't propose to admit evidence as to his general reputation or as to his drinking at other times.

By the COURT.—Yes, that is the attitude the Court maintains. If you have anything in relation to that at all you may proceed.

By Col. NOLAN.—Also as to the other witness.

By Mr. VEAZEY.—Whether or not the driver was intoxicated at the time.

By Col. NOLAN.—Yes, we have no objection to that. So that we won't be harrassed by the condition of the record with reference to these offers of proof that Mr. Veazey has—proof as to any drinking done by Bigelow on the day of the accident, or as to his condition then, if there is any evidence of that kind in the offer made, I will withdraw my objection to that proof.

By the COURT.—The Court knows of no offer embracing drinking or intoxication on the day of the accident. If there is any, it is the duty of Mr. Veazey to call it to the Court's attention.

Thereupon the defendant made the following offer of proof in writing:

We offer to prove by the witness now on the stand that shortly after the accident the witness was talking with Bigelow about the accident, and that Bigelow then told him that it was a piece of paper that caused the horses to run away, and not the carcass referred to in the testimony. [120—58]

By Col. NOLAN.—We object to that, for the reason that the same is incompetent, in that the at-

(Testimony of Charles Hubener.)

tention of the witness Bigelow was not called to it when he was on the witness-stand.

By Mr. VEAZEY.—In that connection let it be noted that at the time we did not have any knowledge of the evidence referred to.

Which said objection was by the Court sustained, and the offer of proof denied. To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Witness continuing.) I have not had very much experience in handling horses. I own a few of them, and have driven them for pleasure off and on until the time that I was about fifteen years of age, and three or four years ago. I am now thirty-four years old.

As regards the carcass of an animal being likely to frighten a horse so that it will run away, there is a lot of difference in horses. Some horses will shy from a dead carcass more than anything else. I know it to be a fact that horses will shy at a dead animal. I have never known of an instance where they were frightened to such an extent that they ran away.

I couldn't tell you the time that Bigelow left on his return to the Ennis Ranch, but I should judge it was maybe three or four o'clock, somewhere in there. It was about the middle of the afternoon. I saw him that afternoon before he returned to the ranch.

Q. What was his condition at that time in reference to sobriety or intoxication?

(Testimony of Charles Hubener.)

By Col. NOLAN.—That is a question that was previously asked.

By Mr. VEAZEY.—I call the Court's attention to that fact.

A. I could not tell you exactly what condition he was in. He was in my place of business.

By Col. NOLAN.—We object to that.

Q. Tell us his condition and how you came to observe it, and all the facts bearing on his condition—just go ahead and tell us.

A. Well, I should judge that I know that Jack was taking a drink or two. I know that. I know he was in the— [121—59]

Q. Tell what you saw—only what you saw.

A. I saw him take a drink or two. That is all I can state. He took one or two with me.

As regards his condition, as to whether or not he was under the influence of liquor at all, he wasn't drunk. What I mean by drunk is that he wasn't staggering around. He apparently looked all right. As regards giving the jury the best picture I can as to his condition, it is quite a long time ago, but I know we were in there together. I met Jack several times that afternoon and talked to him.

Q. Don't hesitate.

A. Well, he was in my place of business and we visited, and naturally had a few drinks together. He also was down at Mr. Doyle's place. He was down in there. I don't know anything about that. During the time that Mrs. Ennis was down at my place, anyway during her absence, he was down at my place

(Testimony of Charles Hubener.)

of business and on the street. I met him several times and remember talking to him. I remember remarking to him as to the team.

Q. Well, now, in the language of the street—don't hesitate to use whatever language you desire to—such language that you would use on the street—what would be the expression of the street as regards his condition when you last saw him that day?

By Col. NOLAN.—We object to that as incompetent. He can tell us what his condition is.

By the COURT.—Yes, this man has been liquor dealing, and has seen men drunk. He can tell whether a man is under the influence of liquor or drunk, without being urged strongly. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Will you describe in your own words, and in the words that you would use on the street what you considered was his condition when you last saw him in Bainville?

A. Well, as near as I can describe it, I would put it this way. He wasn't drunk, but feeling good. That is about as close as I could come to it. [122—60]

Q. Well, didn't you describe it to me as just short of a good start for a spree?

A. Well, if he was feeling good, I suppose if he had stayed there, why, naturally, he would have wound up in a spree.

By the COURT.—You will have to explain to the

(Testimony of Charles Hubener.)

jury where the man started from—*his condition short of the start.* [Corrected by Court.]

Q. Was that the expression that you used to me, that he was just short of a good start on a spree?

By Col. NOLAN.—We object to that as immaterial, what was said to counsel. We were not there to be able to keep track of it.

By the COURT.—Sustained.

By Mr. VEAZEY.—I desire an exception.

By the COURT.—It will be noted.

By Mr. VEAZEY.—I desire to offer to prove by the witness that in response to questions by us as to what was Bigelow's condition when the witness last saw him on the street on the day of the accident, that the witness described him to us as just short of a good start for a spree.

By the COURT.—Any objection?

By Col. NOLAN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—It is very vague. I don't see that it would enlighten the jury any if he did see him *at that stage*, [Corrected by Court.]

~~drunk~~, but he says that he did not see him drunk to the extent that he was staggering, and the witness states that he was feeling good, it looks to me about as far as this witness can go. The objection will be sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Testimony of Charles Hubener.)

Cross-examination.

Q. Do you remember down at the restaurant here this noon, in the presence of Mr. Lunke here and Mr. Wines, stating that you didn't know whether Mr. Bigelow was drunk or sober, that you don't recollect, that it was so long ago? [123—61]

A. No, I didn't say that I didn't recollect whether he was drunk or sober.

Q. I am asking you whether you didn't make that statement, that it was so long ago that you didn't remember, and that, as a matter of fact, you were mistaken in saying that he was out to your house?

A. Out to my house.

Q. I am asking you if you did not make the statement down here at the restaurant this noon, that it was so long ago that you couldn't tell whether Bigelow was drunk or sober, didn't remember anything about it, and also that you were mistaken in the statement that you had already made that he was out at your house that day.

A. I didn't make the statement about Mr. Bigelow being out to our house. I said I wasn't certain when I was on the stand whether that was so or not—

(Counsel Interrupting.) I am asking you whether you did not make that statement that I have referred to.

By Mr. VEAZEY.—I object to counsel interrupting the witness, saying that wasn't his question, when the answer was direct and responsive to the question. You can call for an answer yes or no.

Q. I will ask you again if you did not this noon

(Testimony of Charles Hubener.)

make the statement that it was so long ago that you didn't recollect anything about the condition of Mr. Bigelow on that day, as to whether he was drunk or sober.

A. I said that I wasn't positive; that it was so long ago that it was pretty hard for me to recollect the condition Bigelow was in.

Q. You made that statement this noon?

A. Yes, sir.

Q. Now, did you likewise at the same time make the statement that you were inclined to think that you were mistaken when you made the statement upon the stand that he was out to your house that day?

A. I did say that to Mr. Ennis out there afterward, and told him that after dinner,—perhaps we talked it over—that I wasn't certain. I didn't say I was positive about him being there, and I told Mr. Ennis out there after that, and we talked the matter over, and I told him I [124—62] thought maybe I was mistaken. That is the conversation that we had there, after being out there.

Q. Now, when you testified on the stand in reference to that you didn't tell us there was any doubt in your mind about it.

A. Yes, I did, if you will recollect it, and if you will look it up you will see that I said it seems to me he was out there.

No, sir, I ain't positive yet as to whether or not he was out there.

Q. Well, at any rate, all you know about his drink-

(Testimony of Charles Hubener.)

ing there that day was that you saw him take two drinks.

A. I don't know whether it was two, three or one.

Q. It was possible he only took one drink.

A. I couldn't say how many. I didn't testify that he took two. All I know is that we had drinks together. I couldn't tell you the number of drinks. Yes, sir, I am sure that he took some drinks. That was in my place. I can't recollect who paid for it. I suppose he did and perhaps I did too. I cannot tell you who paid for them. I don't remember who was present. George McCabe was the bartender. I don't know where he is now. The last I heard of him he was at Cut Bank.

At the present time I am doing nothing. I commenced doing that just recently, about ten days ago. Prior to that I was retailing liquor, serving it. I have not been running a saloon for the last year. I was working in a saloon. I am not working at the present time. About ten days ago I was working in a saloon as a bartender.

Recross-examination.

As regards whether, after the adjournment this noon, the plaintiffs sought to discuss with me my testimony, why Mr. Ennis meet me out here in the hall and told me I was mistaken about Jack driving Mrs. Ennis out to my farm. Of course, I figured at the time I wasn't certain. I didn't say I was certain in my testimony, and tried to refresh my memory on it, and I finally told him I thought he was right about it. I could get it from my wife, but I never thought of

(Testimony of Charles Hubener.)

it when I came up here. She was out there and I remember meeting her, but whether I met her the [125—63] first day at the farm, or in town, I couldn't remember. Jack was out at the farm and I think she was. Certainly, I was perfectly free in giving my information to Mr. Ennis.

Q. You didn't hold back anything?

By Col. NOLAN.—I object to that as irrelevant and immaterial, and not proper redirect examination.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We desire to prove that this witness talked voluntarily and freely at the instance of Dr. Ennis in the talk that took place during the noon intermission in regard to all the facts in the case.

By Col. NOLAN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. In view of your statement on direct examination, and the statement now made to Dr. Ennis, in regard to the sobriety or intoxication of Mr. Bigelow, would you turn to the jury and tell them what you know as regards his condition? Give them your best judgment of his condition at any time on the 18th day

(Testimony of Charles Hubener.)

of April at Bainville.

By Col. NOLAN.—We object to that as not redi-
rect examination, as repetition of the testimony al-
ready given.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its
counsel, then and there duly excepted; which said ex-
ception was thereupon duly noted and allowed.

By Mr. VEAZEY.—If the Court please, here is an
instance where, in justice to the witness, it is only
proper—

By the COURT.—No, I don't care about hearing
anything; the Court has ruled. [126—64]

Exception taken by defendant.

Q. I may be incorrect in understanding your tes-
timony, Mr. Hubener. I understood you to say that
your judgment was that, though he was not drunk,
he was under the influence of liquor while at Bain-
ville that day shortly before starting, and I under-
stand that you stated to Dr. Ennis that you cannot
state whether he was drunk. Will you enlarge on
that?

By Col. NOLAN.—We object to that. I don't
think it is right to have a question of that kind put in
the light of the testimony of this witness.

By Mr. VEAZEY.—If I might interpose at this
time—if the jury doesn't want any enlightenment on
that, I want some enlightenment. Here is a state-
ment which I am sure I misunderstood, and I think
counsel has misunderstood it.

By the COURT.—I think not. All this witness'

(Testimony of Charles Hubener.)

testimony was very straight, both before, on the direct examination, and on the cross-examination. I don't think the jury is in any doubt about it. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Do you recognize, Mr. Hubener, that there is any inconsistency in your testimony on direct examination and your testimony as to your conversation with Dr. Ennis?

By Col. NOLAN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—It will be for the jury to say. The objection is sustained.

Exception taken and noted by the defendant.

By Mr. VEAZEY.—We offer to endeavor to get from the witness an explanation as to any possible inconsistency in his testimony as regards the condition of the witness Bigelow, and his alleged declaration to Dr. Ennis.

By Col. NOLAN.—We object to the offer as improper, irrelevant and immaterial. [127—65]

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

[Testimony of Al Provost, for Defendant.]

AL PROVOST, being first duly sworn as a witness on the part of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I am farming at the present time. At the time of the accident in question I had a ranch near the Ennis ranch. I should judge it was a mile and a quarter to a mile and a half east of there. In going to my ranch from Bainville I had occasion to go over this roadway leading along the south side of the railroad track, and then crossing the track and going through a gate to the Ennis property. I guess I crossed there in the spring of 1909 before the accident. As to how often I had occasion to cross there at that time, some days I had to cross every day, night and morning, at some certain time. The number of times I would cross there would vary. When I refer to crossing at this place I refer to times when I went across with horses—driving horses. I have driven all descriptions of horses. I have driven wild horses and quiet horses.

I have never known any effect produced by this carcass on any of these horses at all. As to what experience I have had in driving horses and coming in contact with the habits of horses, I have had experience with a horse that will shy a little bit, but I have always handled them. In this western country you are apt to run across the carcass of a horse any time when driving. I have never known any instance

(Testimony of Al Provost.)

other than the case in question where it is alleged a runaway was caused by a carcass frightening the horses, and I have never had a runaway by horses being frightened by the carcass of a horse.

I could not say anything about what use I made of that crossing from April 1st to April 18th. I might have crossed there, and I might not. I couldn't say for every day at that time. I do not recall any instance where I crossed between the first of April and the 18th of April. [128—66]

Q. Was there any reason why you would cross at that time more than at any other time? A. No.

By Col. NOLAN.—We object to that as immaterial.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Would you say that you didn't cross between the first of April and the 18th of April?

A. I couldn't even say for sure. I might not have crossed and I might have crossed for all I remember.

Q. What would be the object of your going to Bainville?

By Col. NOLAN.—We object to that as immaterial.

By the COURT.—He may answer. It is an endeavor to refresh his recollection. Objection overruled.

A. Well, sir, I was going to Bainville because I had business in Bainville.

(Testimony of Al Provost.)

Q. What work would you be doing along about that time between the first of April and the 18th of April?

By Col. NOLAN.—We object to that as irrelevant and immaterial.

By the COURT.—Objection overruled.

A. Why, I was shoeing my horses and fixing up stuff for all the farmers around there. I had a blacksmith-shop there.

As to what I was doing on my ranch between the first of April and the 18th, I suppose I was doing something there, but not myself.

Q. What time would seeding take place in that part of the country?

By Col. NOLAN.—I object to that as immaterial.

By the Court.—I think so. It is going beyond the issues. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.
[129—67]

Q. Is there anything, Mr. Provost, that would refresh your recollection and enable you to testify as to any use of that crossing from April 1st to the 18th?

By Col. NOLAN.—We object to that as leading and repetition of what the witness has already stated.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Testimony of Al Provost.)

There is another road that leads from Bainville to Mondak, other than the road in question. I guess it was in existence at the time of the accident. I couldn't say for sure whether that road was an open road without gates in it, or a road on which you could go from Bainville to Mondak without opening gates. I couldn't say for sure, because I didn't have occasion to go by that road very much of the time. I had seen the Ennis horses before the runaway occurred on the 18th of April. To my knowledge I would call them a high strung team. No, sir, as to whether I would give any other designation of them, no, sir, I don't know anything about them.

Q. What would you say as regards the skill, if there would be any necessary, to handle them?

By Col. NOLAN.—We object to that as incompetent, irrelevant and immaterial.

By the COURT.—Objection sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Would you say that those horses could be described as kittens? A. I shouldn't think so.

By Col. NOLAN.—We object to that. I don't think that is competent or material.

By the COURT.—I hardly think so. Objection sustained.

To which ruling of the Court, defendant, by its counsel, then [130—68] and there duly excepted; which said exception was thereupon duly noted and allowed.

(Testimony of Al Provost.)

By Mr. VEAZEY.—We offer to prove that, in his opinion, they would not be horses that could be described as kittens, as gentle horses.

By Col. NOLAN.—I object to that as incompetent and immaterial.

By the COURT.—He may describe what he knows of them. He has already said in his opinion they appeared to him a high strung team. The objection is sustained.

To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Can you give us any other description of the horses, other than that they were a high-strung team? A. No, sir.

Q. Would you call them bronchos?

By Col. NOLAN.—To that we object as leading.

By the COURT.—The objection is sustained.
[Corrected by the Court.]

By Mr. VEAZEY.—Where counsel asks questions and endeavors to get the facts, and the witness for one reason or another, perhaps because of the glamour of the courtroom, or what not, is not able to respond readily—

By the COURT.—I don't care to hear an argument. The Court has ruled.

By Mr. VEAZEY.—In the interests of the defendant, I feel called upon to state to the Court—

By the COURT.—When the Court wants any argument from you and instructions on the law, he

(Testimony of Al Provost.)

will ask for it, and until that time comes you will refrain.

By Mr. VEAZEY.—I beg you Honor's pardon, but desire an exception to the remarks of the Court.

By the COURT.—It may be noted.

Which said exception was thereupon duly noted and allowed.

Q. Did you describe those horses to me, Mr. Provost—

By Mr. VEAZEY.—If the Court please, I have got to give this question in this way. [131—69]

Q. Did you describe those horses as bronchos, rather wild and hard to handle? A. I did.

By Col. NOLAN.—We object to that as hearsay and leading, and even if they are so described that is immaterial. The only evidence competent would be as to their runaway disposition.

By the COURT.—The question is a leading one. If the witness has made any ~~contradictory~~ statements here, ~~and this was~~ contradictory of any state-

elsewhere,

ments he had made^ this would be a permissible question *in order to refresh his memory, or if surprise is claimed* [corrected by Court]; otherwise not. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We offer to prove that the witness did to-day describe the horses as bronchos, rather wild and hard to handle. In this connection

(Testimony of Al Provost.)

we offer to prove that the leading of the witness is more or less necessary, and has not been undertaken by counsel until it was found necessary to do so.

By Col. NOLAN.—I object to that as immaterial and irrelevant.

By the COURT.—Objection sustained.

To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Cross-examination.

I am farming at the present time on my ranch about a mile and a half from the crossing in question. There were two roads going through that country there at that time, and both of them going to Bainville, and both of them going to Mondak. They were not separate and distinct from each other throughout the entire distance. They would go to Mondak, but they would come back to Lakeside. Lakeside is southeast of Bainville; it is southeast of the crossing. I think Lakeside is about five or six miles from Bainville. It is not true that as you leave Bainville, coming in the direction of this crossing, you would go to Lakeside before you get to the crossing. If I left Bainville to go to the crossing I would [132—70] go to the crossing first. If you go from Bainville to Lakeside you can go one route and get to Lakeside, or the other route and get to Lakeside, and then the roads come together, and then there is one road thereafter going to Mondak. In each instance you cross the railroad track by either road. I could not tell you whether, at the

(Testimony of Al Provost.)

time of this accident, this road from Bainville to Lakeside crossing where this accident occurred was the road that was principally traveled. I don't know whether the county commissioners started to put up an iron bridge costing several thousand dollars on that road. I worked on a bridge that was put in there, but not that year. It was put in after the accident. As regards which road I took myself in going to Bainville, I took both of them. That is, I have taken both of them. The Central Securities farm had a private bridge over the creek. I crossed there and I have crossed at Mr. Ennis' sometimes.

I didn't have the same horses all the time. I have taken a whole bunch of horses through there at different times during the time this carcass was there. I had always from ten to fifteen head, or more. At different times I was riding or driving all of them. At different times when I went through there I had either one horse or more than one. I have ridden them and I have driven them single. My horses didn't shy at all. I never knew that there was any odor escaping from that carcass.

Q. As a matter of fact, you are a standing witness, aren't you, for the Great Northern Railway Company in all of their cases? A. Standing witness.

Q. Yes, in all of those cases you are always called as a witness for the railroad company.

A. Yes, sir, I was called a few times.

Yes, sir, a carcass may so affect a horse that the horse will shy at it. No, sir, my horses did not. Yes, sir, I have seen a horse shy at a carcass. I can-

(Testimony of Al Provost.)

not tell you when, but I have seen them. I don't know the circumstances. I have seen when you drive by them and they sometimes shy at it. As to what I mean by shying I mean scary. Well, it will just scare them and they will get out of the way. I don't [133—71] let them increase their speed; I hold them down. I always had that experience. I always hold my horses. They have shied, but I have held them just the same. They never shied, going by that carcass on the roadway. I never saw one there. I have had horses shy before this accident, and since this accident. Some of this same bunch that I took over there during the time this carcass was there were horses that I have had shy.

Redirect Examination.

Yes, sir, I have been a witness for the Great Northern Railway Company once or twice. I did not testify in this case before. I was called as a witness at the last trial, but I was never on the stand. I have also testified for the Great Northern Railway Company in Glasgow in a fire case and in Williston, North Dakota. The cases in Glasgow and in Williston were not different fires, but two cases for the same fire. I have testified for the Great Northern in no other case.

[Testimony of Dr. D. R. Brockman, for Defendant.]

Dr. D. R. BROCKMAN, being first duly sworn as a witness on behalf of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I reside at Polson, Montana. I used to reside at

('Testimony of Dr. D. R. Brockman.)

Lakeside, at the time of the accident to Mrs. Ennis, on a homestead there. I know William Gardner. I talked with him in regard to the Ennis accident.

By Col. NOLAN.—You want to ask this witness if Gardner didn't tell him something.

By Mr. VEAZEY.—Yes.

Thereupon defendant offered in writing to prove by the witness now on the stand (Dr. Brockman) that shortly after the accident he had a conversation with the witness Gardner, in which Gardner discussed the accident and the cause thereof, and told the witness that Bigelow had told him (Gardner) that it was a piece of paper that scared the horses and caused them to run away, and not the carcass.

By Col. NOLAN.—I object to that as incompetent and hearsay.

By the COURT.—Objection sustained. Do you contend that there is any possible legal basis upon which that evidence would be proper? [134—72]

By Mr. VEAZEY.—Yes, but your Honor has ruled that you do not desire argument. I will submit it to your Honor at another time.

Which said objection was by the Court sustained. To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

[Testimony of J. A. Torqueson, for Defendant.]

J. A. TORQUESON, being first duly sworn as a witness on behalf of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

In April, 1909, I was out there. I was in Montana, at the Central Security Ranch in Montana. Yes, sir, that is the ranch near the crossing where Mrs. Ennis was hurt. When you ask me whether I remember the occasion of the accident to Mrs. Ennis I cannot understand what you mean. I do not remember the runaway taking place at that crossing. Yes, sir, I remember where Mrs. Ennis was hurt. She was hurt on the other side of the railroad track. I remember a crossing near the Central Security Ranch. Just before she was hurt I stood right up by the barn. As regards whether I saw the Ennis horses at any time before they started to run away, yes, sir, I see them when they came down the hill. As to whether I saw them at any time before they started to come down the hill, yes, sir, I see them coming from the point down that hill.

Q. What hill was that?

A. There was another crossing there further up,—further to the west, nearer to Bainville, and I saw the horses coming down the hill there the last crossing they crossed. That hill is below Miss Hanson's house. I saw them coming down the hill there. As they came down the hill I saw a piece of paper fly, blow—as they came down the horses got away and came right back again. As regards what happened

(Testimony of J. A. Torqueson.)

when the paper flew across the road, when the paper flew out the horses went past; they jumped and went across the track.

Q. Now, where did that happen with reference to coming down the hill?

A. How far? [135—73]

Q. How far from the Hanson house, for instance?

A. Oh, they must be—when the paper blew up, you mean?

Q. Yes. A. I cannot tell how far they are.

Q. Is there any object there that will help you identify where the horses were when that paper scared them?

A. Yes, they wasn't very far from the track.

Q. Was there any object on the Hanson property that would identify that place?

A. I don't know what you mean.

Q. For instance, you leave the hill from the Hanson house and start coming down the hill. What do you come to on the Hanson property before you reach the track?

A. Why, you went through a gate there.

Q. Now, where did that paper fly up and scare the horses with reference to the gate—on the Hanson house side or on the crossing side?

A. On the other side of the gate.

Q. What do you mean by the other side of the gate? A. On Miss Hanson's house side.

Q. That is, on the Hanson house side? A. Yes.

I had occasion to go over that crossing that spring. I worked there. I worked on a piece of

(Testimony of J. A. Torqueson.)

land down this side of Dr. Ennis' place. It was Mr. Lundquist I worked for there. My work in connection with working that land brought me over the crossing. From April first to April 15th I had occasion to go over that crossing for about a week before and after the accident. That is to say, about a week all together before and after the accident. I had four horses that I drove across there. I drove them across in pairs. I drove them across as a four-horse team. They did not pay any attention to that carcass. When I went by there I did not notice any smell from the carcass. During the week that I spoke of I went up and down that crossing every day, and before that I used that crossing just when we worked there. We would pass there. The work which we were doing down on the Lundquist field at [136—74] that time was seeding and plowing and dragging. Yes, sir, I saw what was left of the carcass. I saw the bones left just before the accident. As regards describing the carcass, telling what it looked like, ribs, head and bones was there. I didn't see any meat on it.

I saw these horses coming down the hill, yes, sir. I then took my single horses and I took Lundquist's saddle horse and went over. I saw Miss Hanson and others there and then I came over. Mr. Lundquist came there. There were a few others; I don't know who they were. I noticed Bigelow, the driver.

Q. Did you notice anything in regard to his condition, in regard to whether he was under the influence of liquor or not? A. Just smell, that's all.

(Testimony of J. A. Torqueson.)

Q. What do you mean—you smelled the liquor?

A. His breath.

I first started to work at the Central Security Ranch in the middle of March, 1909. I don't know what time it was that I first started to work in the Lundquist field which made it necessary for me to go across this crossing. It was in the spring. I cannot tell the date exactly; I don't know the date. I do remember that it was some time before the accident. I didn't see any other horses go over that crossing prior to the accident, no, sir. When I would go over there I would go over there alone. Yes, sir, at other times I guess the other hired men crossed there when I crossed there. Other teams were crossing there at those times, yes, sir, Lundquist's teams. They would not cross with me, but after me. Sometimes I was ahead of them and sometimes they were ahead of me. Sometimes I would see them cross and sometimes I would not. I didn't notice any effect of this carcass on those horses.

Cross-examination.

Q. When did you first speak to anybody about the horses being frightened by this paper?

A. I didn't speak to anybody. I just seen these horses, they come—

Q. There was somebody from the railroad that came to see you, some claim agent? [137—75]

A. That time?

Q. Yes, or soon after. A. There was nobody.

Q. Well, any time did they come to see you?

A. There was nobody spoke to me about that.

(Testimony of J. A. Torqueson.)

Q. Nobody spoke to you at all? A. No.

Q. And you never spoke to anybody about it, **did** you?

A. No, not anybody. There was the people who seen it after it happened.

Q. Well, did anybody from the railroad come—any claim agent, come to see you about your testimony, about the evidence that you would give, what you knew? A. No.

Q. When was it that you first told anybody that you saw the team frightened by the paper?

A. Frightened where?

Q. When did you first tell anybody about that?

A. I don't remember.

I was over at the barn, yes, sir, across the railroad track from Miss Hanson's, and the team was coming down the hill. It got frightened at a piece of paper. I didn't see them get frightened from the paper, but I seen the paper fly up in front of them. As regards how large a piece of paper it was, it was large enough to see it. I couldn't tell you whether it was about a foot square, as indicated by you, but I see the paper. I saw it coming from the ground, yes, sir. I couldn't tell you how high it came. I didn't see it strike the horses. No, sir, it is not true that I didn't see the horses at all, or that somebody has been telling me about that. I don't know where the paper went to after it got up. I couldn't state whether the paper blew from the brush or from the ground, it came up. I don't know whether it is true that it would not come from the ground

(Testimony of J. A. Torqueson.)

if it came from some shrubbery or brush on the side of the road. I don't know where it came from but I see the paper. That was before the horses reached the gate. As [138—76] to whether the horses were then lost from my sight, and as to whether there was a time that I didn't see them, why I saw them all the way when they crossed the track, the top of the buggy. Yes, sir, there is a depression in the ground, but it wasn't so deep but what I could see the horses. Yes, sir, I could see the horses all the way.

Q. And for what distance?

A. For what distance?

Q. From the time when they got scared until they reached the track. A. How far, do you mean?

Q. What was the distance that they traveled?

A. That they were traveling?

Q. Yes. A. I couldn't tell.

Q. Did you see what Bigelow was doing when the paper scared the horses?

A. No, I did not. No, sir, I didn't see what he was doing at all. No, sir, I did not see what he was doing during the time that they were going on until they came to the track. I see them here running and when they came across the track.

Q. Well, how much of the horses did you see?

A. How much of the horses?

Q. Yes, how much? All of them, from their feet up to their heads.

A. That I could see them.

Q. You could see all of them from their feet up?

(Testimony of J. A. Torqueson.)

A. Yes, I could. I stood up high.

No, sir, I did not get up on the building. I stood by the barn. I saw the team coming down the hill across here and there is a ravine there. On the plat you show me the Hanson house and the crossing. They would be coming down this road to this crossing, yes, sir. As to whether I saw the paper as they were coming down the slope of the hill, yes, sir, on the foot of the hill, on the bottom of the hill.

Q. Then the team got to the bottom of the hill, down in the [139—77] bottom when you saw the paper?

A. Yes, the team was in so deep that I couldn't see it there.

Q. How did they come down the hill—were they trotting?

A. Yes, they were trotting down the hill.

They wasn't walking. I did not notice whether Bigelow was whipping the team or not, no, sir. Yes, sir, I could see all the time they were coming down the hill. I didn't see their feet, no, sir, but I saw the horses and the buggy. I don't know how far it is from the Hanson house to the bottom of the hill; I never measured it. I was by the barn. You can't say how far the barn would be away from the bottom of the hill when you do not measure it. I cannot say for sure. I cannot tell. I didn't measure it. It must be an eighth of a mile from me, from the place where I stood. I was standing by the manure pile behind the barn. There was a high manure pile there. I saw the team coming and I was look-

(Testimony of J. A. Torqueson.)

ing at it. No, sir, I did not expect a runaway. I was watching the team because there was a friend of mine, he was coming up from town to get a team. He said he was coming down that Sunday, and I thought it was him coming. I don't know what the distance is from the bottom of the hill to the railroad track. It ain't very far. As to whether it would be a hundred feet, I cannot tell for sure. I couldn't tell whether it was a hundred feet or more. No, sir, as I saw the team coming down the slope I couldn't tell if it was my friend or not before I came over there. I thought it was when they came.

No, sir, I did not know Mrs. Ennis for a number of years. I had never seen her before. I had met Bigelow a couple of times. I couldn't tell who those people were before they came over there. I couldn't say for sure who was in the buggy until after the accident.

Q. Did anybody ever come to see you about what your testimony would be, come to see you up there?

A. Where?

Q. Come to see you about standing up there where you were working, up to Lundquist's place?

A. No.

Q. And you never told anybody before. You couldn't say what [140—78] your testimony would be, what you were going to tell, or what you knew?

A. Well, I was going to tell what I seen.

Q. I am trying to find out whether you told somebody else about this before you came here.

A. Yes.

(Testimony of J. A. Torqueson.)

Q. Well, who was it that you told, did you tell Lundquist? A. No.

Q. You were working for Lundquist? A. Yes.

No, sir, I ain't working for him yet. I am farming for myself. I am now working ten miles north of Bainville.

Q. Do you know those special agents down there, the railroad claim agents? A. I don't know.

Q. Well, now, you saw this team constantly from the time it started to come down the hill until it got past the track?

A. Yes, I saw them come down from the hill until they crossed the track.

No, sir, I didn't lose sight of them; they just came across the track.

Q. Well, as you came down from Hanson's, you came down a slope didn't you, and you strike the bottom, don't you? A. Yes.

Q. Then there is an elevation again, and then there is another slope, isn't there?

A. Yes, on the other side of the track.

Q. That is on the other side of the track.

A. Oh, there isn't on the Hanson side of the track.

Q. A slope? A. A slope, yes.

Q. Well, after you get down to the bottom then you travel on the level ground until you get to the track.

A. From Hanson's place, do you mean?

Q. Yes. [141—79]

A. When you come down from the Hanson place there is a little ravine, and you go through that and then you come up the track.

(Testimony of J. A. Torqueson.)

Yes, sir, I saw them when they were in the ravine. Yes, sir, in the ravine you could see them. Yes, sir, I saw them when they came up to the track and got on the railroad track. No, sir, I can't tell you about the size of this piece of paper. I know it was a paper that scared the horses because it was white, but it might have been a piece of cloth. I don't know whether it was or not. I could not tell whether it was a piece of cloth or a piece of paper. I should say it was white. As to how I happened to tell that it was a piece of paper, when I didn't know whether it was a piece of paper, I thought it was a piece of paper. I don't know whether it was a piece of paper or not, but I say it was white. No, sir, no one told me, in speaking about it, that it was a piece of paper that I saw flying up.

I didn't notice any smell from that carcass. When I crossed there I didn't notice in what direction the wind was blowing—whether it was blowing towards the road or away from it. I didn't see any flesh upon this carcass at all. I don't say that there wasn't any flesh. I see the bones. I didn't see any portion of the skin on the bones. I didn't take no notice of that. I just put my eyes on it when I passed there a couple of times. The carcass was laying along there on the side. I didn't notice whether there was any flesh right close to the ground on the carcass. I wouldn't say there was not. I didn't notice any. I saw the bones there.

There are two roads there. One goes along the track and one goes up by Miss Hanson's house. The

(Testimony of J. A. Torqueson.)

road that comes down the slope into the ravine I could see from where I was. Yes, sir, in that ravine I could see a team from where I was.

Q. Isn't it likewise true that the brush conditions were such there intervening so that you couldn't see?

A. That is a very hard question.

Q. What do you say as to that, as to whether or not the brush conditions were not such as to shut off your view from where you were? [142—80]

A. Well, when that team came I could see the whole thing from that road.

There was not a good deal of brush there that I could see. I saw over the brush, yes, sir. Yes, sir, my horses never shied. I cannot tell you how close to the carcass they got. I drove the animals across there in the month of April, yes, sir. No, sir, I did not drive them in March. I passed a week in seeding. I drove across there every day for a week. Yes, sir, night and morning. I was going down to the place where I worked. I was coming from the place where we stopped all night. We went from the farm down to this place where we worked and then came back to this farm in the evening. That was in the month of April. That was not in the month of March. I never went there in the month of March. I commenced doing that sometime in April. No, sir, I did not go by there for two weeks or so before the day of the accident, night and morning, but for a week. Sometimes the weather was warm and sometimes it was cold. This week sometimes it was warm and sometimes it was cold. No, sir, I

(Testimony of J. A. Torqueson.)

didn't smell anything at all.

In taking the horses along there I drove them afoot. The horses were not hitched to any conveyance at all. I drove them. I had the lines. I had a team and was behind them, yes, sir, and the horses were ahead of me. No, sir, I didn't notice whether the horses saw the carcass, or not.

I cannot tell you how high this manure pile was above the ground. It was high enough to see the horses.

Q. Well, if you were standing on the ground, could you see standing on the ground, as well as up by the manure pile?

A. Yes, I was standing there and saw it.

Q. I thought you told me that you went up there for the purpose of finding out whether this team coming along there was the team with somebody that you expected.

A. Yes, I said I was standing up there and I seen the team coming.

The manure pile was way back of the barn, yes, sir. I was standing there. No, sir, I wasn't working at the time. This was Sunday. I [143—81] didn't work. I was not working that day. As to what took me there, I was in the barn and taking care of the horses, and then I saw the team coming and I went up there.

[Testimony of John Lundquist, for Defendant.]

JOHN LUNDQUIST, being first duly sworn as a witness on the part of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I reside at Bainville. I am a farmer and merchant, a country merchant. I am in the banking business, general merchandise, lumber, ranching and farming. I ran a general merchandise store at Bainville. I was at Bainville at the time of the accident to Mrs. Ennis. At the time of that accident I was up at the farm—it is called the Security Ranch. I did not see the runaway. I saw the scene of the accident, I presume about three minutes afterward, but the horses had already disappeared before I saw it. Mr. Flynn and myself were in a buggy. I was sitting in front of the barn at the Security Ranch with Mr. Flynn. We drove over there as fast as we could, and when we got there we found Mrs. Ennis sitting on the ground. We noticed Bigelow. I saw Bigelow. He was quite excited, and—well, I wouldn't say I considered him sober nor drunk. I couldn't say in regard to that, but the man had been drinking some. As to how he talked, well, he was excited. Oh, I don't know that there is any other symptom that I can give you as bearing upon his condition. Bigelow talked while there, yes, sir. He talked to different people.

Q. Now, as regards his manner of speech, was there anything in that, that would indicate his condition with reference to sobriety or intoxication?

(Testimony of John Lundquist.)

By Col. NOLAN.—I shall object to that. Of course, we shall insist here that what he did was competent, and if we are going to have what he said we want it all.

Q. Was there anything about his breath?

A. I didn't get close enough to smell of his breath.

In going to the scene of the accident we took the road along the railroad track, that being the shortest. That road leads right along [144—82] the railroad track and right there at the crossing. It is west of the track. The railroad runs north and south and the public highway goes east and west. As regards reaching that road from my ranch, well the gates are open, and there is a private crossing there to my right, a quarter of a mile northwest of where this other crossing is. Yes, sir, we went along that road and then the Bainville road leading to the crossing, and then went over the crossing. At the time we went over the crossing to get to the scene of the accident we were driving Mr. Flynn's horse; it was a single horse. It was a good spry, driving horse, a good stepper. The carcass did not have any effect upon that horse at that time. As we went over that crossing at that time we did not notice any odor from the carcass.

About the time of the accident and for some time prior thereto my men were putting in a crop on some land that I have got south and east of there, south and east of the Ennis place. I think it started somewhere about the 10th, 12th or 15th—somewhere along in there, of April. They wasn't working on this

(Testimony of John Lundquist.)

occasion any more than the men that ran the engine. They had been down there and cleaning up and they came back from that before the time of the accident. I couldn't say how long that work continued. There was only a couple or three hundred acres that we put in there. I had probably eight or ten men working there in the spring. Yes, sir, the crossing was used in connection with this work. When they worked on that part of the farm, they would use that crossing morning and night. They all worked the horses except the man that worked on the steam plow. I never saw any of those horses cross the crossing at that time, except the team that I drove myself going down there to inspect the work. Oh, I would inspect the work there every day or every other day. In going down there to inspect that work sometimes I drove a mare that I had, and sometimes I drove a team. I had a private mare that I drove. Sometimes I would get a team from the livery barn that I had up town. These were just ordinary horses. They would shy, but they were not the most gentle horses. In the course of using that crossing I did not notice any effect of that carcass upon my horses. I never noticed any effect at all. I never noticed any of them, and never [145—83] heard any men talking about it. No, I don't recollect that I ever got any odor or smell from the carcass as I went over there. It was so early in the spring, so there wasn't very much.

Miss Meinhardt, Miss Peterson, Flynn and myself and then some of the men on the farm were there

(Testimony of John Lundquist.)

immediately after the accident. I don't just remember who they all were. Those people were all acquainted with Dr. Ennis, yes, sir. All I know about that is that I have seen the ladies associate with Mrs. Ennis and Dr. Ennis at different times up town together. That is all I know about it. The women got there probably a minute later than we did.

Q. What did they do while they were there?

By Col. NOLAN.—We object to that as immaterial.

By the COURT.—He may answer.

A. They were talking to Mrs. Ennis.

Q. How was Bigelow dressed on that occasion?

Did he have a coat on?

A. He did not. Not when we came over there.

Q. What was the condition of his vest?

By Col. NOLAN.—Objected to as immaterial.

By the COURT.—Objection overruled.

A. His vest was unbuttoned.

Q. As he would go around there, did you see anything upon him by reason of his vest being open or unbuttoned?

By Col. NOLAN.—Object to that as immaterial.

By the COURT.—Objection overruled.

A. There was a bottle sticking up through his inside vest pocket.

As regards the condition of that carcass at the time of the accident I never looked at it at the time. No, sir, I never looked at the carcass at the time of the accident. As regards the condition of the carcass about the time of the accident from my having seen

(Testimony of John Lundquist.)

it at other times, I can not state within a few days what its condition was, but I saw it there and it had been burned. That is, I saw pieces of ties that they had used for burning it and they hadn't all burned up. [146—84] There was dirt thrown up against the sides of it. All the coyotes and dogs, and I had an old hound there, and they were all feeding off of that horse all winter. As to whether there was any meat on the bones that I could see, I was never interested enough in those kinds of things to notice. No, sir, I don't recall that I ever saw any meat, because I don't want to look at those things any more than I have to.

Cross-examination.

As to whether it was a very ungainly object to look at as it was there, and in the condition in which it was, well, I have seen worse by far, but then at that very day that we saw it we were interested in something else, and we didn't allow it to agitate us. Yes, we did not look at it at all that day, but I had seen it there that spring. It was just the form of a horse, and the meat off of it on the top of it and the edges. There was not very much sunshine at that time of the year on the 18th of April. I don't recollect whether there was any at all. There was not very much degree of rottenness at that time of the year, not very much about the 18th of April. I don't recollect whether there was any at all that day, but I know there couldn't have been very much, because the frost wasn't out of the ground until the middle of April or so, when we started our spring work. I couldn't tell

(Testimony of John Lundquist.)

you what the temperature was on the 10th of April, but I know we worked in the field about that time and so on. It was not down to freezing there until the night-time. Certainly in the daytime it got pretty warm.

Q. Well, now, do you pretend to tell us, Mr. Lundquist, that it was not any decomposed—any decomposition in that flesh there at all?

A. Not as bad as later on in the summer when the weather was warm.

Q. I don't care how it would be, but I am asking you was there any at all?

A. I never noticed any.

Q. You wouldn't say that there was, or was not?

A. No, I wouldn't. I knew there was nothing said about any smell that day.

Q. I didn't ask you about that, Mr. Lundquist. Will you kindly answer my question? [147—85]

By the COURT.—Yes, don't volunteer any information.

I shipped a little on the Great Northern. I don't see how I could ship over any other road. I am in the merchandise business; also in the farming business, and I handle a good deal of farm products, and I use the railroad for that purpose in the shipment of it, certainly. I am not on the very best terms at times with the railroad. I had to sue them once. This was about five or six years ago. I haven't had any lawsuit with them for five or six years, but I have claims against them, but they are not settled. No, sir, they do not settle them. There are claims

(Testimony of John Lundquist.)

four or five years old outstanding. No, sir, I don't expect to settle them, because they cost more to collect than they are worth. Yes, sir, I am going to give them up. It is immaterial to me whether they are friendly or unfriendly. I have got to pay my freight just the same. I don't expect to collect those claims. They have refused payment. My place of business is at Bainville, at Poplar and at McCabe, and I am also in the lumber business. Certainly cars of lumber that I handle come over that railroad. I don't deliver any lumber. The farmers come in and buy it from the lumber yard and haul it away.

I was over that crossing at least three times a week prior to that Sunday when the accident occurred. Yes, sir, if the accident occurred on Sunday I was there at least three times the preceding week, and probably six for all I remember.

Q. But you haven't any recollection about it at all, except that being your practice, you did do that in this instance?

A. I went down there and started them to work in that field, in that farm down there, both with the steam rig and with the teams.

Q. You are not answering my questions. I said, as to going over there three times, or six times, or as to going over there six times, you have no recollection about it, except as it might be in the observance of a practice of yours? Is that correct?

A. Why, I only know that I went down there when the men were working there practically every day.

(Testimony of John Lundquist.)

Q. Have you any recollection about that?

A. Yes, sir. [148—86]

Q. Very well, then, if you have tell us how many times you went over there the week preceding that Sunday?

A. I have told you about three times at least.

Q. And maybe six times.

A. Yes, sir, I wouldn't say.

It was early in the winter that I first saw this carcass there, probably in January. In comparing its condition then, as compared with its condition as I saw it three or four days before the Sunday on which the accident occurred, at times it was whole, and afterwards they had it pretty well chewed off. Yes, sir, some of my dogs assisted the coyotes. They took turns about. I was not watching or observing them myself, but I have a boy that did. Yes, sir, when we came to the scene of the accident there were some people there before us. I came by the road. I crossed the railroad in front of my place, and then crossed it at the crossing where the runaway was. I drove along the track on the west side of the railroad. I did not come by that branch road that came around by the Hanson house. I took a short cut. Miss Hanson was there when I got there. Miss Meinhardt and Miss Peterson were there and Mrs. Ennis. Mrs. Ennis was sitting on the ground. No, she was not paralyzed. She said she was hurt, but she thought she would be all right. Yes, sir, it was apparent to me that she was badly hurt. Yes, sir, Bigelow seemed to be excited. I do

(Testimony of John Lundquist.)

not know anything about whether he had been up to the Hanson house then or not. Only I saw them there from the time they left town. He was not panting particularly, he wasn't doing any running. A man doesn't have to pant if he ain't moving very fast. His vest was open, yes, sir. I don't know whether he had been working that afternoon or not. I don't know anything as to why his vest was open or whether it was consequent upon his running up to the Hanson's. I couldn't say whether he was drunk or sober. He had been drinking a little. I certainly saw him walking around there. Yes, sir, he talked. I wouldn't say that he was drunk. He could talk and he could walk. As to whether I have known Bigelow intimately, I had seen him around there for a couple of years or more.

My horse had never shied at the carcass, no, sir. No, sir, no [149—87] teams that I drove there ever shied at this carcass.

Redirect Examination.

I had a suit about five years ago against the Great Northern for stock killed on this crossing. That case was tried by the railroad company. I won it. I was served with a subpoena by you to attend in court to-day.

Q. Were you present at the time of the last trial?

A. I was.

By Col. NOLAN.—We object to that as immaterial, whether he was or not.

By the COURT.—I think so.

Q. Were you in attendance at the last trial as a

(Testimony of George Anderson.)

witness for the plaintiffs?

By Col. NOLAN.—We object to that as wholly immaterial.

By the COURT.—Sustained.

To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We offer to prove that at the last trial the witness was present and was called as a witness for the plaintiffs.

By Col. NOLAN.—We object as immaterial.
[Corrected by Court.]

By the COURT.—Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

[Testimony of George Anderson, for Defendant.]

GEORGE ANDERSON, being first duly sworn as a witness on the part of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I have already testified. I was assistant road-master for the Great Northern Railway Company, having jurisdiction over the scene of this accident. The carcass was laying there in plain view. The occasion which I had to be there at the crossing was going over the line on hand-cars or on trains. I would have occasion to go over on the hand-car two or three times a week. I make those trips the year round, two [150—88] or three times a week for the year.

(Testimony of George Anderson.)

The condition of the carcass as I observed it after the burning was that it was principally bone. At the time of the accident or about that time it looked to me like a heap of bones. I did not see any flesh on it. I didn't see any skin on it. It was not unpleasant as I passed by there. I did not notice any odor from it.

Q. Did you ever hear any complaint made in regard to this carcass appearing there?

By Col. NOLAN.—We object to that as irrelevant and immaterial, whether he heard complaints or not.

By the COURT.—Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We offer to prove that no complaint was ever made, and the witness knows of no complaint ever having been made as to the carcass being there.

By Col. NOLAN.—That is objected to as irrelevant and immaterial.

By the COURT.—Objection sustained.

To which ruling of the Court, defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Prior to the runaway in this case which is alleged to have been caused by the carcass there I had never heard of a case where horses had run away by taking fright at a carcass.

Cross-examination.

I was then living at Culbertson, about eighteen

(Testimony of George Anderson.)

miles from this carcass. I was in the habit of going over this track about three times a week, sometimes on the train and sometimes on a vehicle that I handled myself. In going by on a train, as to whether I would have much of a chance to observe this carcass, or any odor that might be emanating from it, it would be in plain sight on account of being inside of a curve so that it could be plainly seen on the train. You could get the odors [151—89] from the train if there were any there. If there was any there and the wind was right you could get it on the train. I rode on both passenger and freight trains. Those trains were running day and night. Sometimes I rode in the night-time and sometimes in the daytime. My recollection is that I first saw it in December. It would be a matter of a month anyway. I don't know the exact time I first saw it. I didn't make a note of it. I first directed that it should be burned the first time that I discovered it. The reason why I gave that direction was to do away with it for sanitary purposes. Burning it will do away with it for sanitary purposes, won't it? I was present when the carcass was there.

Q. And you were apprehensive, weren't you, that it would decompose, and that there would be an odor from it? Wasn't that the object that you had in view in burning it? A. Yes, sir.

Q. Well, now, in January there wasn't any danger of any odor; it was cold up there in January?

A. Yes, sir.

Yes, sir, somewhere near there was the time that

(Testimony of George Anderson.)

I first ordered that this burning should be done.

Q. And it wasn't for sanitary purposes then that you gave directions that it should be burned?

A. We get a Chinook occasionally.

Yes, sir, I was expecting a Chinook. Yes, sir, I directed that it should be burned again, and I directed that it should be burned a third time. I figured on destroying it. I wanted to destroy it by burning it, yes, sir. As to whether it was destroyed on the 18th of April, well, there couldn't have been much left of it. There is no odor from bones. The skeleton was there. I gave orders to destroy it, so it wouldn't smell.

Q. Now, seemingly, the first time that you gave directions the work wasn't done, so that there was a possibility of it smelling. A. Yes, sir.

That was the early part of winter, in the early part of January. [152—90] It couldn't have been there over ten days the first time I ordered it burned. Yes, sir, I gave directions to somebody who was working for the company to do that. It was pretty cold then. I gave directions for the second burning on my next trip about two days after the first burning. Yes, sir, my orders were carried out a second time.

Q. So that there wasn't any direction given by you in reference to it after that?

A. I think I sent—I was out there on foot one day, and I told them to burn it again.

I couldn't say how long the directions as to the third burning were given after the second time.

(Testimony of George Anderson.)

Q. Do you know whether your orders were carried out the third time, or not?

A. Well, that I wouldn't say. It is quite a while ago.

Yes, sir, I got off at the crossing there myself at times to inspect the track, to inspect the crossing. At that time I was in close proximity to this carcass. I have no recollection as to how recently before the 18th of April it was that I got off at the crossing there. No, sir, I never got any odor from it myself at all. I never got any odor either before or after the first burning or second burning or third burning, if there was a third.

[Testimony of John Hamilton, for Defendant.]

JOHN HAMILTON, being first duly sworn as a witness on behalf of the defendant, Great Northern Railway Company, testified as follows:

Direct Examination.

I have already been sworn. Shortly after the carcass appeared on the crossing I was prospecting for gravel. I prospected for gravel a couple of months. In prospecting for gravel, in the course of a day I would prospect south, north and southeast, all around there in the vicinity of old Bainville. Old Bainville is just about a quarter of a mile from this crossing. In that work of prospecting for gravel, in going to and from my work I went by this crossing lots of times. I would be out on a trip prospecting for gravel ten hours a day. Ten hours work was my day. I would be out prospecting for gravel possibly

(Testimony of John Hamilton.)

eight or ten hours a day. I would be out just about eight hours is [153—91] what I mean. Then I would come home every day. As regards what opportunity I had to observe this crossing from the time the carcass was there until the time of the accident, well, I was prospecting for gravel in all directions around Bainville there. I passed that railroad crossing there, we will say about three or four times a week. I don't remember exactly about that, about how many times in the week, and the carcass of a horse was burned there. The carcass was burned three times. The first time it was not a very good job on that carcass, and then the section foreman that was in charge of the section at the time started up another fire and burned it. But still there was something left after that, and the Central Security had a lot of hound dogs, you call them, and I see the dogs there eating the meat off. After I finished my search for gravel I had charge of the same section. As regards my opportunity, in the course of my work in charge of that section, after I had finished searching for gravel, to observe that crossing, well, my duty was to go over the section every morning, and go over the section regularly. I would return every day, but sometimes it was late in the evening, about five o'clock. My section extended from Lakeside on the east to the west end of the Bainville yard.

Q. So your section extended from the west end of the Bainville yard easterly?

By the COURT.—You needn't go into details. If the plaintiff wants to examine him, he can. All his

(Testimony of John Hamilton.)

duties would cover too much ground for this particular purpose.

Q. How would you go over your section?

A. About twice a day.

We start out from Bainville at seven A. M. on a hand-car, operated by hand. As regards whether in approaching this crossing, there would be anything that would control our movements over there, and over that crossing, as regards going fast or slow, we had to stop there and send a man ahead there on account of a sharp curve and a cut to the east. I had to send a man ahead to look for trains.

Q. In your work as section foreman what is your duty?

By Col. NOLAN.—I don't care about this. I don't see any point to this. [154—92]

By Mr. VEAZEY.—I want to show his opportunity for observing the conditions there.

By the COURT.—Never mind, bring it right *to the crossing*, [Corrected by Court] down, ^ and if the transaction isn't specified with sufficient particularity, that can be brought out on cross-examination. Prove what he knows about the conditions at this crossing.

Yes, sir, I know the facts in regard to the carcass and its condition. I never noticed any odor or smell from that carcass.

Q. Was there any fact right before the accident, or do you recall any fact which would show your ability to observe whether or not there was any odor from that carcass?

(Testimony of John Hamilton.)

By Col. NOLAN.—We object to that as being incompetent, immaterial and irrelevant and leading and suggestive.

By the COURT.—You have asked him in infinite *now and* [Corrected by Court] detail ^ what he saw there. ~~and~~ *He* has said there was no odor. Now, I think, that serves your purpose. Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Did you ever stop there shortly before the accident? A. Yes, sir.

Q. What did you stop there for?

By Col. NOLAN.—We object to that as immaterial.

By the COURT.—Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—We offer to prove by the witness now upon the stand that he often went back and forth there before and after the accident, and that he and his men took dinner on the right of way there on the crossing and observed no odor from the carcass.

By the COURT.—You can ask why he stopped there. Ask him how long he stopped there.

By Mr. VEAZEY.—Is the offer of proof denied?
[155—93]

By the COURT.—Oh, yes.

(Testimony of John Hamilton.)

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Col. NOLAN.—Of course I have no objection to his showing that he was there a week before, and that he crossed there.

By the COURT.—The Court has indicated that he may do so. There is a limit to these matters of detail.

Q. How long did you stop there on the occasion about a week before the accident, right near the carcass?

A. I stopped there during dinner time, I and my crew, eating dinner there.

By the COURT.—You are asked how long you stopped there at that time.

A. An hour.

I stopped right in the crossing there at the edge of the track.

Q. What direction did you give as regards the burning, as regards the fuel which should be used?

By Col. NOLAN.—We object to that as immaterial, what directions he gave as to the fuel or what was done in that connection.

By the COURT.—Objection sustained.

To which ruling of the Court defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

No, sir, I did not set the fire myself.

Q. When you would look for gravel what conveyance did you use then?

(Testimony of John Hamilton.)

By Col. NOLAN.—We object to that as immaterial.

By Mr. VEAZEY.—Will your Honor trust me in this particular this time—

Q. How did you go?

By the COURT.—The trouble is you make it hard

Too much detail. travelling and

work, your examination. ^ This matter of his ^
is not of consequence.

stopping there for dinner. ^ It was enough for him to stop there that long, *and to testify he had, to demonstrate his opportunity for observation.* [Corrected by Court] [156—94]

and to say so, to show his opportunity for observation,

It was enough for him to stop there that long ^
detailing he stopped

without ^ ~~stopping~~ there for the purpose of eating his dinner *or any other reason.* [Corrected by Court.]

Q. How did you go over the country when you would go prospecting for gravel?

A. On a saddle-horse.

Yes, sir, that saddle-horse took me over that crossing. That carcass did not bother my saddle-horse at all as I went over that crossing. At the time of this accident I had entered a homestead. I have a farm, yes, sir.

I haven't had very much experience in handling horses. That was about the only time I handled a horse, when I was prospecting for gravel. I do not know of any instances where a horse, or horses have

(Testimony of John Hamilton.)

been frightened by the carcass of another animal to such an extent that they have run away. I was prospecting for gravel, and I met bones, piles of bones there. They didn't scare my horse there at all, but if there was a moving piece of paper or glass, or anything of that kind, my horse would get scared, but didn't get scared of any bones.

Cross-examination.

Q. That is to say, your experience with horses is that a carcass doesn't disturb them in the least, but anything else would, is that it?

A. Well, yes, that is all.

Yes, sir, I am working for the company. I have been promoted. I am section foreman there now. I was that in 1909. I didn't consider prospecting for gravel a promotion. I was taken from my position as section foreman and put to prospecting for gravel, and then put back again as section foreman. I was taken from my position as section foreman to prospect for gravel shortly before the accident, a few days, three or four days, or five maybe. I got through with prospecting about the first of March. I noticed that there was nothing left but bones before I got back to the section, several days before I got back to the section. Yes, sir, before the first of March there wasn't anything there but a heap of bones. They were piled up together in a bunch after the bones were all scraped together. Some of the bones were attached to the back [157—95] bone, some not. I didn't count how many. After the first

(Testimony of John Hamilton.)

of March there wasn't any flesh there at all that I know.

Q. It really was a desirable place for lunch, near this carcass, wasn't it?

A. Yes, that was in April.

Q. It was a nice place to sit down? A. Yes.

Q. It was a nice place to sit down in April?

A. Yes. Before the accident we were working around the curve, in that vicinity there, and I stopped at the crossing there and ate dinner right on the edge of the road about. It would be sixteen or seventeen feet from the carcass.

Thereupon the defendant rested.

[Testimony of Dr. H. L. Ennis, for Plaintiffs (in Rebuttal).]

Dr. H. L. ENNIS, one of the plaintiffs, being sworn and called in rebuttal, testified as follows in his own behalf:

Direct Examination.

I know where the Lundquist barn is, concerning which the witness Torqueson has testified. I know this road that comes along the Hanson place as it proceeds along towards the track. It would be absolutely impossible for a man standing where Torqueson says he was standing to see a team coming down there. After you leave the Hanson house about ten rods you get into the ravine, and there is a high cut bank between the barn and this ravine that would absolutely preclude the sight from there to the railroad right of way. You couldn't see down there. So, after you get down into the cut, no, sir, there is

(Testimony of Dr. H. L. Ennis.)

no possibility of seeing that team until you get on to the railroad track.

I got home about four o'clock and the accident happened about two thirty; that is what they told me. The team and the wagon were in the barn. Bigelow told me he brought it in.

By the COURT.—Would you say, when you saw him about four o'clock that he was under the influence of liquor or not?

A. I didn't see any indications of it. [158—96]

Cross-examination.

I have been up to the Security Ranch many times. Yes, sir, I have been up at the barn and tried to look toward the Hanson house and to see along that road. I have lived there three years and was over that ground daily. As to how often I have gone there for the purpose of seeing whether you could see high enough so that you could tell whether you could see a team or not in that situation, I never went there for that purpose, but I know, as a matter of fact, that you can't see after you leave the Hanson house, driving toward the railroad. It is impossible to see from that barn after the team came in down to that ravine. It is absolutely impossible. As to whether I made any experiment myself of going over there to see whether I could see or not, I know the topography of the ground there, and I know that it would be absolutely impossible. That high cut bank around the bank of that creek cuts off the view of that ravine, and that ravine is deep enough so that you cannot see.

Q. You know, of course, that we have always con-

(Testimony of Dr. H. L. Ennis.)

tended that the team was frightened by that paper, and that the runaway was caused by that paper?

By Col. NOLAN.—We object to that as not proper cross-examination.

By the COURT.—Objection overruled.

A. Why, I have known that there was that kind of evidence put in, yes, sir. I have known of it all the time.

Q. You made no experiment upon the ground there to see whether the horses coming down the hill there could be seen?

By Col. NOLAN.—We object to that as not proper cross-examination.

By the COURT.—Objection overruled.

A. Well, I cannot understand what you want to find out.

Q. Well, the question is whether you went back there and experimented at all by looking down into that bottom for the purpose of seeing whether you could see a team after it got into that ravine?

A. I never went over to the Security Ranch for that purpose, [159—97] but I have been over there, and I know from the lay of the country there that it would be absolutely impossible to see anything from that locality. The barn is on low ground and Miss Hanson's house is on high ground.

Plaintiffs rest in rebuttal.

[Exception Taken at Conclusion of Trial.]

By Mr. VEAZEY.—Might I say this at the conclusion of the trial, and take this exception as regards the conduct of the trial? Your Honor knows that

I have the utmost respect for your Honor in every way—in ability, and in every way, but I do feel that your Honor has ruled against us too frequently, and has hampered us in the examination of witnesses, and your Honor's demeanor towards us may have affected the jury. In the event that the issue is against us, we would like to take the benefit of the advantage of having your Honor review on a motion for a new trial the entire proceedings to determine whether or not we are wrong in contending that your Honor's general attitude throughout the trial was prejudicial to us. If your Honor does not desire us to take the exception we will not take it, but if agreeable to the Court, we desire to take the exception.

By the COURT.—Any exception you have in the record you will be entitled to. You may have any exception you think you are entitled to.

By Mr. VEAZEY.—I would like then to take the exception, so that, if necessary, your Honor can review the matter on a motion for a new trial.

By the COURT.—Very well.

The foregoing is all the testimony introduced upon the trial of the above-entitled cause.

The stipulations under which the depositions, constituting part of the plaintiffs' case, were read in evidence, are as follows: [160—98]

**[Stipulations Under Which Depositions Were Read
in Evidence.]**

IT IS HEREBY STIPULATED that the depositions of Mrs. Charles Allison, formerly Miss Alma Hanson, Katy Meinhardt, Charles Conwell, R. H. Sweetman, Charley Johnson, Charles N. Bain, John

Lundquist and Fred Swant may be taken before William Powers, a United States Commissioner and notary public, at Bainville, Montana, and that, when taken, the said depositions may be used on the trial of said action, subject to the same objections, except as to form of interrogatives, as if said witnesses were personally present and testifying upon the trial of said cause, and that said depositions may be taken in shorthand and transcribed into typewriting, and, when so transcribed, shall be received by said parties and used as true and correct copy of said testimony given at said hearing, and both parties to this stipulation waive the signing of the depositions by the witnesses, subject to all objections except as to form, and subject to any rights reserved in this stipulation.

Said depositions were taken, pursuant to said stipulation, and were properly returned. In said depositions the witnesses Allison and Meinhardt each testified on direct examination as to conversation they had with Mrs. Ennis as to the cause of the runaway, but the Court excluded such testimony as hearsay, and would not allow the same to be read to the jury. Where also in the foregoing Bill of Exceptions the former testimony of a witness appears to have been presented to him by question and answer, the same were read to the witness from a transcript of his former testimony, stipulated by the parties to be correct.

Said cause was at issue only as regards the plaintiffs and defendant Great Northern Railway Company, said cause having been long since discontinued

as to the codefendant John Hamilton, who has never been served with any papers subsequent to the filing of the transcript on removal in this cause, which transcript embraced only the original complaint and the demurrer of the defendant Great Northern Railway Company to said complaint, which said papers were the only pleadings then filed in said cause.

[161—99]

Instructions Requested by Defendant.

Thereupon the defendant requested the Court to give the said defendant's requested instructions as follows, to wit:

No. 1A. You are instructed to return a verdict for the defendant Great Northern Railway Company.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 1B. You are instructed that the evidence does not show, and is in law insufficient to establish that the defendant Railway Company knew that the carcass referred to in the evidence was an object likely to frighten horses, if such is the fact, and you are not permitted to base your verdict upon that allegation so made in the complaint but not proved by the evidence.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there

duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 1C. You are instructed that the evidence does not show, and that the evidence is in law insufficient to establish that the defendant Railway Company knew, or in the exercise of reasonable diligence should have known that the carcass, referred to in the evidence, was an object likely to frighten horses, if such is the fact, and you are not permitted to base your verdict upon that allegation so made in the complaint but not proved by the evidence.

Which said instruction was by the Court refused, to the [162—100] refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 1D. You are instructed that the evidence fails to disclose, and is in law insufficient to establish that the defendant Railway Company placed the carcass, referred to in the evidence, at or near the place charged, and you will, therefore, disregard the allegations of the complaint to the effect that the defendant Railway Company placed the carcass anywhere, and you cannot base your verdict upon this theory of the plaintiff's action, which has been charged by them but which they have failed to prove.

Which said instruction was by the Court refused, to the refusal to give which said instruction as ten-

dered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2A. You are instructed that even if the proof discloses that the defendant Company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that, at the time of the runaway, the defendant Railway Company was absent, and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, if any, and had the last clear chance, by the exercise of reasonable care, to avoid such negligence, if any, and failed to do so, and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof, and the death of the deceased was not [163—101] proximately caused by such negligence, if any.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2B. You are instructed that, even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the

uncontradicted evidence establishes that, at the time of the runaway, the defendant Railway Company was absent, and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, or by the exercise of reasonable care might have discovered the same, and had the last clear chance, by the exercise of reasonable care, to avoid such negligence, if any, and failed to do so, and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof, and the death of the deceased was not proximately caused by such negligence, if any.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2C. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place, and is no longer present, and someone approaches such place and discovers, or by the exercise of reasonable diligence might have discovered, the negligence of such defendant, and [164—102] has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers, but a

mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause, and in the occurrence of which its negligence was merely a condition or circumstance.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2D. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place and is no longer present, and someone approaches such place and discovers the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers, but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause and in the occurrence of which its negligence was merely a condition or circumstance.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there

duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows: [165—103]

No. 2E. Even if you find that the defendant railway company was negligent in any of the matters complained of, nevertheless you cannot return a verdict for the plaintiffs if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees knew, or discovered, or in the exercise of reasonable care should have known or discovered, said negligence, if any, of said defendant, and had the last clear chance to avoid the same and negligently failed to avoid the same. If such is the case, then the negligence, if any, of said defendant is in law but a condition surrounding the accident and not, in law, a proximate cause of the accident, for no one is after discovering, or having the means of discovering, that another has been negligent, entitled to thrust himself upon the negligence of another or blindly refuse to discover the negligence of another, and if he does so, it is, in law, his own act or omission, and not the negligence of the defendant, which is the proximate cause of the injury.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 2F. If you find from the evidence that the defendant railway company placed, or negligently permitted to remain, at the place narrated in the complaint, the carcass of a horse so that it was an object likely to frighten horses driven upon the roadway in question, such negligence, if any, on the part of said defendant would not be a proximate cause of the runaway and of the damages, if any, caused by the death of the deceased, if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees knew of and discovered said [166—104] negligence, if any, or by the exercise of reasonable care should have known or discovered the same, or had the last clear chance to avoid the same and negligently failed to do so. Under such circumstances the negligence, if any, of the defendant railway company would be a mere condition or circumstance of the runaway but not a cause thereof.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 3A. You are instructed that under the evidence in this case the driver John Bigelow was the agent or employee of the deceased and of Dr. Ennis, one of the plaintiffs, and knowledge, if any, or means of knowledge, if any, on his part is deemed in law knowledge or means of knowledge on the part of the

deceased and of Dr. Ennis, and his acts or omissions, if any, in the performance of his agency and employment, and within the scope of the same, are, in law, acts or omissions, if any, for the consequences of which, if any, the deceased and said Dr. Ennis are bound and affected to the same extent as if they, or either of them, had personally partaken in such acts or omissions, if any.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 4A. You are instructed that the evidence does not show, and is legally insufficient to establish, that the place where said Nettie Ennis and John Bigelow attempted to drive across [167—105] the railroad track of the defendant railway company was anything other than a roadway by invitation of the railway company.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 4B. The railway company was not, in any event, under any absolute duty to remove the carcass in question, if you find that the carcass caused the

runaway; it was at least under not more than an alternate duty, that is to say, to exercise reasonable care to remove the carcass, or to exercise reasonable care to give warning of dangers, if any, which might arise from its presence, if you find that such dangers existed. And, in this connection, a knowledge by any person of such dangers, if any, or the fact, if it is a fact, that, in the exercise of reasonable care, such person would know of such dangers, if any, would dispense with any necessity of giving such person warning.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 4C. Before the plaintiffs can recover in this case, it must be established by a preponderance of the testimony that the runaway was caused by the horses taking fright at the carcass, that the carcass was an object not only capable of frightening horses but also an object of such a nature that it would be likely to frighten horses, and this also to such an extent as to cause them to run away, and that defendant railway company knew this, or in [168—106] the exercise of reasonable care should have known it, and that the circumstances were such that defendant was under a duty to remove the carcass and negligently failed to do so. In addition the plaintiffs cannot recover, even if you find these

things to be true, if you further find that the driver or Doctor Ennis knew, or in the exercise of reasonable care would have known of these dangers.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 4D. You are instructed that under the evidence in this case the defendant railway company was, as regards that portion of the roadway crossing its tracks and on its property, entitled to have there such articles or objects as it saw fit provided that it gave warning thereof to persons using the crossing, and, in the event that any such person knew of the presence thereof, and of the dangers, if any, flowing therefrom, this would dispense with any duty to give warning as to such person, and such person using the crossing with the knowledge aforesaid would do so at his own risk, if any, and defendant could not be liable to him for damages, if any, thereby sustained.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 5A. The measure of damages in this class of suits is the pecuniary injury or damage, if any, sustained by the heirs; that is to say, before you can allow the plaintiffs any compensation for '[169—107] injury or damage, if any, sustained by them you must first find by a preponderance of the evidence that such injury or damage, if any, has a pecuniary or money value, that is to say, that its value can be measured in money. If, therefore, in considering items of damage, if any, you find that such items of damage, if any, are incapable of being measured in money, or that as the result of any award of money to the plaintiffs for such items of damage, if any, the plaintiffs would be richer, or would profit in a pecuniary or money way by the death you must not allow anything for such items of damage, if any. It is only in so far as you may find that the preponderance of the evidence establishes that damage, if any, has been sustained by the plaintiffs and that the extent or value of the net loss, if any, to the plaintiffs can be estimated in money, so that as the result of your verdict in the event that it should be for the plaintiffs, the plaintiffs would be neither richer nor poorer from a pecuniary or money point of view alone as the result of the death, that you can give any compensation to the plaintiffs for the death.

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 5B. The measure of damages in this class of suits is the pecuniary injury or damage, if any, sustained by the heirs; that is to say, before you can allow the plaintiffs any compensation for injury or damage, if any, sustained by them you must first find by a preponderance of the evidence that such injury or damage, if any, has a pecuniary or money value, that is to say, that its value can be measured in money, and for any items of damage, if any, which have no pecuniary value, you can make no allowance. [170—108]

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

Defendant likewise requested the Court to give its requested instruction as follows:

No. 5C. Plaintiffs allege in their complaint that by the death of said Nettie Ennis, the plaintiff Herbert L. Ennis has been deprived of the comfort, society and association of his wife, and the said Guy W. Ennis has been deprived of the care, supervision and attention of a mother. You are instructed that, as regards these items of damage, the alleged loss, if any, to the plaintiff Herbert L. Ennis of the comfort, society or association, if any, of his wife, and the alleged loss, if any, to the plaintiff Guy W. Ennis of the care, supervision or attention, if any, of his mother no recovery can be had, except in so far

as such comfort, society or association, or such care, supervision, or attention, if any, has a pecuniary or money value; that is to say, that the value of such comfort, society or association, or the value of such care, supervision or attention, if any, can be measured in money. For example, if, by the death of a parent, a child is deprived of the association, care or supervision of a parent, this loss may include instruction, if any, which would probably have been given, we may assume in a given case, to a child by the parent, and this instruction may have a pecuniary value, and to this extent a recovery could be had by the child for the net pecuniary value of such instruction; but no allowance can be made for any item of damage, if any, represented by loss of comfort, society, association, care, supervision, or attention, if any, in this case unless you find from a preponderance of the evidence that the same was of such a character, or of such a nature that it has a pecuniary value, and then only to the extent that the same has a pecuniary value. [171—109]

Which said instruction was by the Court refused, to the refusal to give which said instruction as tendered the defendant by its counsel then and there duly excepted, which said exception was then and there duly noted and allowed.

(Here will be inserted the Court's ruling endorsed on the back of rejected instructions. By the Court.)

Said endorsement is as follows:

"39 offered. Many various renderings of same principle. The Court has selected from the mass

several, but declines to further examine and speculate which others it should give.

BOURQUIN, J.”

Thereupon the cause was argued to the jury by counsel for the respective parties, the plaintiffs and the defendant Great Northern Railway Company, and at the close of the argument the Court gave to the jury its charge as follows:

Instructions.

Gentlemen of the Jury:

The Court will now deliver to you its instructions; that is to say, it will very briefly recall the issues to your mind. It may be it may make some comment upon the evidence, and it will state to you the rules of law that should govern you in determining what your verdict will be in this case.

In this case, as in all cases before you, when the case is left to you to pass upon, you take the law from the Court, and that is so that the law will always be the same. The Court always gives the law the same, and if the jury takes its own view of the law, why, one jury might take one view, and another jury might take another view in a like case, and we would never know what the law was, nor would litigants know what the rules of law were, or generally are. If the Court should make a mistake in the law, it will be in the record, and it can be corrected; but if you make a mistake in the law, it is locked up in your mind, and there will be no opportunity to make the correction. But when it comes to determining what facts are proven, and what issues of fact are proven, that is exclusively for you to determine in a

case such as this. You determine what witnesses tell the truth, how much weight you will give to their evidence, how much credibility the witnesses are entitled to. The Court may express an opinion upon those facts, but you are not bound to take the Court's opinion of [172—110] the facts. You are bound by the Court's opinion of the law, but not of the facts. If your opinion coincides with the Court's view of the facts, why, of course, you should follow it, because you are following your own opinion of the facts.

This is a case for what is termed in the law "wrongful death."

The plaintiffs in the case charge that prior to April, 1909, a certain roadway crossed the right of way and tracks of the defendant railway company which was used by the traveling public, and it is alleged that the defendant company placed and permitted and allowed to remain on its right of way near where said roadway crossed the same, the carcass of a horse, so that it became a public nuisance, and the carcass so remaining there in proximity to the roadway, became and was such an object as to frighten teams driven on the roadway, and that the defendant company knew this, or in the exercise of reasonable diligence should have known it, and that on the 18th day of April, 1909, one Nettie Ennis, wife of the plaintiff, Herbert L. Ennis, and mother of the plaintiff, Guy W. Ennis, had occasion to use the roadway, and so using it, was riding in a buggy to which was attached a team of horses driven by one John Bigelow, which team was then, and at all times,

gentle and tractable, and that the team so driven, when at or near the point on said roadway where the said carcass was, became frightened by said carcass, and so becoming frightened, started to run away, and did run away, and said Nettie Ennis was thrown bodily from the buggy, receiving injuries from which she thereafter died, and through the death of said Nettie Ennis, the plaintiffs, as husband and son, have been deprived of the comfort, society and association of Mrs. Ennis, as wife and mother, and have, likewise, been deprived of her services, to their damage, as it is alleged, in the sum of twenty-five thousand dollars. This the defendant denies, namely that it placed this carcass there, or that it allowed it to remain there. [173—111] It denies any responsibility for that, and denies that it was negligent at all in connection with this carcass. It furthermore sets up a plea of contributory negligence, that is to say, it alleges that if it was negligent in and about the situation of this carcass, that when the plaintiffs' driver Bigelow took the wife through that place, he was negligent in his driving, and that this negligence contributed to the injury, and without his negligence the injury would not have happened.

Briefly the issues in this case are: Is the defendant responsible at all for the placing of this carcass at the place where the evidence shows it was? In brief, it might be, did the defendant's railway train kill and throw this carcass in that position along this roadway? If that issue is determined against the defendant, then the next question would be, whether or not in so allowing it to remain there, the defendant

was negligent. In other words, did it act as a reasonably ordinary prudent man would act under like circumstances? Was this carcass at that time and place, in April, 1909, an object, in its appearance, or by reason of odors arising from it, if any did, that would be likely to frighten ordinary teams passing along the roadway at that time? If you should determine that question against the railroad company, then the question would be possibly, whether or not the driver Bigelow drove over there in the exercise of ordinary reasonable care on his part; and then finally might be, the amount of damages, if you find for the plaintiffs, that the plaintiffs have suffered by reason of the acts of the defendant.

As the question is one of negligence of the railroad company, the Court will say to you that negligence is the failure to do what the average reasonable and prudent person would ordinarily have done, under all the circumstances, or doing what such a person under all the circumstances would not ordinarily have done. You cannot, therefore, find the defendant railway company guilty of [174—112] negligence, unless you find that the conduct of the said defendant was inconsistent with the ordinary conduct of the average reasonably prudent person under all the circumstances. In other words, the test as to whether or not the said defendant has been negligent in the respects at issue in this case, is not what a reasonably prudent and diligent person could or would have done, or omitted to do, but what the average reasonably prudent and diligent person ordinarily would have done, or omitted to do under the circum-

stances of this case.

In this case, it appears that there was a traveled way along the railroad track, across the railroad track; that it was generally treated in the community as a public highway; that the people who had occasion to travel that way used it; that the county authorities treated it as a highway, maintained it as such, and at the point where it crosses the railroad track, the railway company had planked the way, making it easier to cross, and they had put up cattle-guards as is customary, on each side of the railroad, and these cattle-guards had run out to the side fences, the same as on highways. The Court will say to you that while this was not a legal highway, in that it had not been laid out by the county, with all the requirements of the law, as it is agreed, by the authorities, yet to all intents and purposes, this was a public highway, and imposed upon the defendant the same duties in relation to it that would be imposed upon it in connection with a legal highway, and conferred upon the plaintiffs, and the deceased woman, the wife of Herbert L. Ennis, the same rights to travel that she would have to travel on any public highway. Now, the law is that no one can cast obstructions in a public highway, and endanger the safety of travelers thereon. If they do that, if it is negligence under the circumstances, if they obstruct the roadway so that it is not reasonably safe for travelers to pass over, and if, and because thereof, travelers traveling over it in the exercise of [175—113] ordinary care for their own safety are injured, then a party who has thus obstructed the highway is liable in damages

for whatever damages have been suffered by reason of the accident.

In this case, if you find that the defendant had killed this horse by one of its trains, and threw it down below the travelled part of this sixty-foot highway across its line, and left it there from January or December, until April, and that when April came, on the day when this lady was crossing there, the appearance of the carcass, and the odors from it were such as tended to frighten the ordinary teams that would pass over the highway, and teams of ordinary gentleness and training, why, you would be justified in finding that the defendant was negligent in leaving the carcass there, under those circumstances.

You have a right to consider, in arriving at this, all the circumstances, to call upon your ordinary judgment, as men, in reference to the likelihood, and the tendency of this carcass, in the condition that the witnesses have told you it was on the 18th of April, 1909, and the odors which would likely arise from it, if it was in that condition, you have a right to call upon your ordinary judgment to determine as to whether or not it had a tendency to frighten teams, as I have stated to you; and if it had such tendency, then the railroad company was negligent.

The Court will say to you, as to the condition of the carcass, that there is some dispute amongst the witnesses as to its condition at that time, and that condition is for you to determine—where the truth lies in respect to that matter. Even if you should find that this carcass at that time and place was in such a condition that it had this tendency to frighten

ordinary horses, and if the defendant company was negligent, then there might be a question in this case as to whether or not there would be an issue in this case whether this negligence caused the team to run away, and injure, and afterwards thus kill the wife and mother of the plaintiffs; [176—114] because when a party is negligent in any manner it does not follow that they are liable, unless that negligence is the proximate cause of the injury to some other person—in this case, these plaintiffs' deceased wife and mother.

The proximate cause, to be the proximate cause of the injury to the lady, why, it would be the cause that directly, and without any intervening responsible cause, caused the team to run away and throw the lady out to her injuries.

There has been evidence that as the team approached the place where this carcass lay, it had already been frightened by paper flying across the road, and the team, by reason of this paper fluttering before it, had run away,—run across the track, and upset the buggy, and injured the lady, from which injuries she died. Now, if that is the situation, if that is the case, if it was the paper that caused the team to run away and throw Mrs. Ennis out to her death, why, of course, this defendant is not liable here. Whether or not it was the paper, or whether it was the carcass itself, is for you to determine.

I will say to you as to this issue, whether or not the defendant placed this carcass there at the time and place, and allowed it to remain there, placed it as I have said, killing it, or by knocking it and throw-

ing it and leaving it there, the burden of proof is upon the plaintiffs. It must satisfy you by a preponderance of the evidence that the railroad company killed and threw it there. If it did kill and throw it there, and did leave it there,—there is no question about that—when I say that that must be proved to you, by a preponderance of the evidence, I mean by the greater weight of the evidence. Does the weight of the evidence show to you that the defendant company had killed and thrown that horse there? So with respect to what frightened the team, and caused it to run away and tip the buggy over there, and throw Mrs. Ennis out, the burden is on the plaintiffs to prove that to your satisfaction by a preponderance of the evidence, that is, the [177—115] greater weight of the evidence. If upon that point, you are in doubt as to whether it was the paper that caused the team to run away, and caused the accident, or whether it was the carcass, its appearance, and the odor from it that scared the team, and caused the accident, then, of course, you could not find for the plaintiffs; you would be bound to find for the defendant, because the plaintiffs would not have sustained, proved their case, to your satisfaction by the greater weight of the evidence; and if you believe the evidence on that point is equally balanced, you would be bound to find for the defendant, because the plaintiffs would not have sustained, proved to your satisfaction by the greater weight of the evidence, that the defendant was negligent in that respect; and if you believe the evidence on that point is equally balanced, you would be bound to find

for the defendant, because the plaintiffs cannot ordinarily sustain this action except by proving to your satisfaction by the greater weight of the evidence, how the accident happened. You can all understand that. No one is to be deprived of property, or to pay for accidents unless they are responsible; and they are not responsible unless it is proven to your satisfaction by a preponderance of the evidence, by the greater weight of the evidence, that they are the responsible parties.

There is also evidence tending to show that as the team approached the crossing, it was frightened by a piece of paper, but that the driver got it under control, and that, just as he was coming up to the crossing, the wind blew so that the odor from the carcass reached the team, and set it off, and it rushed across the crossing, and because of the cramped situation there, it ran into the fence and upset the buggy, and injured the lady. It seems as if when the team came from where it had been frightened by that paper, wherever it was, and approached the crossing, the carcass lay on the other side of the crossing ahead of the team, and in a depression alongside the road. Whether the team could actually see [178—116] it from that point, whether or not if it did see it, it would have rushed across the crossing in the face of the carcass is a circumstance that you may consider in determining the truth here. It may be that even after the team saw the carcass, and if it did not, even had the odor of it, and was yet under the control of the driver, instead of wheeling around, it might have tried to shoot across the way, and past the carcass,—

those are also circumstances for you to consider, and points for you to determine.

Now, at this point, comes this proposition: The issue in reference to the contributory negligence alleged against the driver Bigelow and, in reference to that, all the Court has heard in the way of evidence is that Bigelow had been drinking that day, a drink or two, seems to be all the direct evidence. Possibly you would say one drink is all that is actually proven; but it is for you to say because the witness Hubener was the defendant's witness, and if he is in doubt, you have the right to take the most favorable view of the evidence for the plaintiffs. There is other evidence that witnesses smelled liquor on Bigelow's breath, saw a bottle in his pocket. They do not describe the bottle, but, perhaps, under all the circumstances, it would be a fair inference that it was a bottle of liquor of some kind. Outside of this, the evidence shows there were other horses which passed there, and had not been seriously frightened, and you would have a right to infer that it would not frighten horses that were driven with ordinary care. There is not much evidence from which you might infer negligence on the part of Bigelow; at the same time the Court will leave it to you to say, under proper direction, as to the charge against Bigelow. The charge, of course, would be thrown over to these plaintiffs as to whether Bigelow was negligent himself. Contributory negligence means that a party who is laying a claim against another person for his negligence, was himself lacking in ordinary care due for his own safety, under

the circumstances, and that, because of that, contributed to [179—117] his injuries. In other words, if he had not been negligent, the injury would not have happened; that even though the defendant company was negligent in leaving the horse there, and even though it frightened the team, yet if Bigelow had driven with ordinary care, and thus prevented the accident—and could have prevented the accident that happened, why then his negligence contributed to the injury; and since he was the servant of Mr. Ennis and Mrs. Ennis, they would not be entitled to recover in this case. Now, that is for you to determine. Now, this condition the defendant must prove, and prove to your satisfaction by a preponderance of the evidence, even as the plaintiff has proved the other issue. If upon the question of the negligence of Bigelow, you are in doubt, or if you believe the evidence on that point is simply evenly balanced, then the defense has not proved it, and then you put the question of contributory negligence out of sight, and should not allow it to influence you in the final determination of this case.

In my opinion, the evidence of contributory negligence would be very slight. But you are not bound by that opinion. You have a right to infer it from the fact that Bigelow had some drinks; but I imagine most men take a drink or two occasionally, and the question is whether that incapacitated him so that he, when driving across the crossing, where the carcass was, was not acting as a reasonably prudent man should. Unless you find by a preponderance of the evidence that he did not so drive, why, you put the

question of contributory negligence out of sight.

I have here a written instruction upon the question of this highway, which I will read to you.

If you find from the evidence in this case that the roadway which crossed the right of way of the defendant company was one which was used by the public as if it were a public highway, and was treated by the public authorities, having to do with the maintenance of public highways, as if it were a public highway, and if you likewise [180—118] find from the evidence that the defendant company treated it, as it crossed its right of way, as if it were a public highway, and invited the public to use it as if it were such, in that event, the defendant company would be held to the same accountability in seeing that no nuisance was maintained thereon, as if it were a public highway, and if you find from the evidence that the defendant company treated it as if it were a public highway, and placed, and allowed to remain on its right of way at or near such roadway, the carcass of a horse, which, in form, and by reason of the odor that it exhaled, was such an object as was likely to frighten horses driven along said roadway by the traveling public, then the existence of such a carcass in such a condition, would be a public nuisance, and for any injuries done to the public so using said highway by such roadway by such an object, the defendant company would be liable.

The Court will say to you, however, that so far as this case is concerned, the animal was not on the right of way, but was on this roadway, because you must treat it as a roadway for all the purposes of this case.

The legal effect is just the same ; in so far as this case is concerned, if the defendant placed it there, whether it was on the roadway, or on this highway, would be an immaterial matter. If you find, then, that the defendant company placed this horse at the point where it has been testified to before you and left it there, that, under all the circumstances, was negligence, as the Court has defined negligence to you ; and if you find that by reason of that carcass being there, this accident happened to Mrs. Ennis, that is to say, that it frightened the team, and caused the runaway, and the throwing out of Mrs. Ennis, with the result of death, and if you find Bigelow was not himself guilty of negligence in driving across the road at the time and place charged, and contributed to the injury of Mrs. Ennis, then you come to the proposition as to the amount of damages which you will allow these plaintiffs. [181—119]

Upon the matter of damages, the Court will say to you that when the death of one person is caused by the wrong or the neglect of another, his heirs may maintain an action for damages, if any, sustained by them by reason of the death.

The object of the law is not to enable the survivor to make profit, if any, out of the suffering, if any, or other damage, sustained by the deceased, but solely to compensate the survivors for the damage, if any, sustained by them, to the end that they may receive compensation for any loss, if any, sustained by them, but without their making profit, if any, out of the death. In the event, therefore, that you find a verdict for the plaintiffs, in assessing their

damages, if any, you will bear in mind these important principles that you are not permitted to allow compensation for damage, if any, sustained by the deceased, but only for the damages, if any, sustained by the plaintiffs, and you will award to the plaintiffs only such a sum as will, in accordance with the Court's instructions, constitute compensation to them for the damages, if any, sustained by the plaintiffs themselves, as the result of the death, as such items of damage, if any, are itemized, and the measure thereof defined in the instructions of the Court.

The plaintiffs itemize their damage in the complaint as follows: They say that by the death of said Nettie Ennis, the plaintiff Herbert L. Ennis has been deprived of the comfort, society and association of his wife, and that the plaintiff, Guy W. Ennis has been deprived of the care, supervision and attention of a mother, and that both of the plaintiffs have been deprived of the services of the said Nettie Ennis. You are instructed that in the event that you find a verdict for the plaintiffs, you can award them no item of damage, if any, except those which they have alleged that they have sustained as just outlined, and compensation can be awarded as to these items of damages, if any, only in accordance with the limitations given you by the Court in its instructions. [182—120]

That for any distress or injured feelings, if any, caused by a death, no compensation can be awarded. It is impossible to estimate in money the extent of such damage, if any, and the law will not undertake to even endeavor to give any money compensation

for that which, in its very nature, is incapable, when it exists, of valuation by any money standard. You are, therefore, instructed that no compensation can be given for damages, for distressed or injured feelings, or grief on the part of the plaintiffs.

In considering the loss, if any, of the plaintiffs, by reason of the death of said Nettie Ennis, you are instructed that due allowance must be made (by way of reduction of any sum that you would otherwise award to the plaintiffs) for any and all reasonable and necessary costs or expense which the plaintiffs might be compelled to incur, would be compelled to incur, if any, in order to secure the services, if any, of said Nettie Ennis, had she lived; such as all reasonable and necessary costs, or expenses, if any, of food, clothing, shelter, and all other reasonable and necessary expenses, which you may find the preponderance of the evidence establishes, if any, that the plaintiffs would probably have reasonably or necessarily expended upon the said Nettie Ennis for her maintenance, support or comfort, and all such sums, if any, must be deducted, before your verdict is finally reached, in the event that your verdict may be for the plaintiffs; in other words, as regards the amount of your verdict, in the event that you find for the plaintiffs, the question is, as regards the damages, if any, of the plaintiffs, what is the net loss, if any, which the plaintiffs will suffer by reason of the death of said Nettie Ennis.

The case is precisely the same. It is an unusual case. There has never been any case passed on by the Supreme Court of Montana, that I know of, and

possibly not any in any of the appellate courts. The case is precisely as if the plaintiff, Mr. Ennis, had lost the son, instead of a wife. The damages are to be measured by [183—121] his pecuniary loss what her services are, her association, her companionship, her society, her aid and encouragement would have been to him, in a pecuniary way; it is precisely as in the loss of a son. The husband is entitled to the services of the wife, just as he would be entitled to the aid of a son, if he had arrived at the age of twenty-one years.

The plaintiffs charge that by reason of the death of said deceased, they have been deprived of the services of said Nettie Ennis. As regards this item of damage, to wit, the alleged loss of the services of the said Nettie Ennis, you are instructed that in the event you should find a verdict for the plaintiffs, you can allow them such a sum, if any, as compensation for the item of damage, if any, as would be represented by the difference between the costs, if any, which the plaintiffs would reasonably and necessarily be obliged to incur to secure similar services, if any, by employing some other person to perform such services, and the costs, if any, which the plaintiffs would reasonably and necessarily be compelled to incur to secure the services of the said Nettie Ennis, had she lived.

The Court will say to you, however, that the value of the services of a wife in the household are not to be measured by what it would cost to replace her mechanical services by a domestic servant. That is not at all the rule. You can have in mind what it

would cost to secure the mechanical work which this lady would have done, and you have a right to consider in that the fact that she was the wife, and the counselor and advisor of her husband; that she was a helper to him, that her society was his, that he was entitled to it, and the fact that her companionship might inspire in him greater efforts in his own behalf, and all these matters you have a right to take into consideration to determine the pecuniary loss to these plaintiffs by the death of Mrs. Ennis.

If you find for the plaintiffs then you should assess their [184—122] damages at such sum as will reasonably compensate them for the loss they have sustained, and in determining that loss, you may take into consideration the society of which they have been deprived through the death of Mrs. Ennis. You may also take into consideration the loss which they have sustained on account of the services of which they have been deprived through her death.

There is no evidence in this case that the deceased Mrs. Ennis, rendered any services to her son, so that in estimating his loss, if any, you will take into consideration the value of the society, the comfort and association of which he has been deprived through the death of his mother, and fix upon it, if it is of any pecuniary value to him, such value as in your honest judgment attaches thereto.

In estimating the loss, if any, which her husband has sustained, you may take into consideration the society, the comfort, the association and companionship of which he has been deprived, as well as the loss of the services, if any, thereby.

The law in a case like this is somewhat peculiar. It is apparent obvious that the husband has suffered more than the son has suffered, in a case of this kind, and yet the jury may not apportion them in that verdict. When the verdict comes in, it is a single verdict and the husband and the son will share the damages equally. At the same time, however, you have in mind the difference, in damages, if you find there is a difference, and simply make your verdict a total of what in your honest judgment the husband has suffered, and how much in addition, the son has suffered.

The Court will say to you that in estimating the damages as in a case like this, no uniform rule is possible; but all the jury can do is to take into consideration the matters going to make the life of the deceased woman, the pecuniary, that is the money, value to the plaintiffs. In a case such as this, very much depends upon your good sense and your sound judgment, in view of all the [185—123] circumstances of the case. You are to endeavor to be fair, to be just, and not moved by sympathy nor excited to increase the just damages by the grievous situation in which the plaintiffs, the husband in particular, have been left. You are to determine the pecuniary loss, the money loss that these plaintiffs have suffered. If you find that the plaintiffs are entitled to a verdict, that amount, reasonable and fair, you are to write into your verdict, if you find such.

When you retire to your jury-room you should select one of your number as your foreman, who will sign the verdict.

Twelve of your number must agree upon any verdict that you may render.

Objections and Exceptions to Instructions.

Thereupon the defendant duly objected and excepted to the Court's instructions as follows:

By the COURT.—Have the plaintiffs any exceptions?

By Col. NOLAN.—No exceptions.

By the COURT.—The defendant.

By Mr. VEAZEY.—There are one or two. The Court will remember, one was the instruction to the effect that the test was as to whether the carcass was likely to frighten horses. I think that should be frighten horses to such an extent as to cause them to run away.

By the COURT.—Oh, certainly, the Court has stated that.

(The Court addressing the jury.) The jury will understand the test is whether the carcass in its then condition, appearance and odor, if any, was such as was likely to frighten teams of ordinary gentleness and training, to an extent that it would do damage to those in charge of that team,—frighten them so that they would run away, and so do injury. Of course, if there was some shying, from which no injury would follow, naturally why, that is not what is meant by frightening a horse to an extent that would cause the defendant to be negligent by leaving the carcass there.

By Mr. VEAZEY.—That being so, I withdraw my objection.

Further, there was one where the Court instructed

the jury that if it had that tendency the railroad company [186—124] would have been negligent. We contend that the jury should be instructed that it would also be necessary for the plaintiffs to establish that the railway company knew of this tendency, or, in the exercise of reasonable care, should have known it.

By the COURT.—Well, the test will be whether a man of average common sense would know that it would have a tendency to frighten animals at that place. And if it would, if the average reasonable man would know it, then the defendant company would be taken to know it.

Of course, if it is an unusual circumstance, something that no reasonable man would expect to follow from leaving the carcass there, that is a different proposition. The defendant would not be liable; but it is left to your sound sense and judgment to say whether or not in that condition at that time and place and under the circumstances of the road crossing, whether or not the average reasonable man would know that this was a dangerous object, as I have defined it; if so, the railroad company would be liable, otherwise not.

By Mr. VEAZEY.—I should like to take an exception as regards that, on the ground that your Honor has said that that would be the fact whether or not the railroad company should have known of the condition there. Your Honor should charge, in addition to what your Honor has said, that the railway company would not be negligent unless, in its situation, it knew, or should have known, of the alleged

fact as to the tendency of the carcass.

Which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—The others relate merely to exceptions as regard to what your Honor and I would differ upon as to the law. I would call your attention to them. One exception is, there is no instruction on what would be the measure of duty in the event the jury should find that this was merely an invited way.

By the COURT.—We differ on the law there. I think you have saved that point by your peremptory instruction.

Which said exception was thereupon duly noted and allowed.

By Mr. VEAZEY.—Then there is another instruction. In regard to the placing of the carcass. Your Honor has instructed the jury that [187—125] if the carcass was placed there by being struck with a train, that would consist of the act of placing the carcass. We except on the ground that the act of placing the carcass has not been proven, there is no proof of such a fact.

By the COURT.—Your exception will be noted.

By Mr. VEAZEY.—We also except on the ground that we should not be liable for the placing of the animal, unless we were negligent in the placing, in the first place; that is, unless it amounts to negligence in the operation of the train that struck it.

By the COURT.—Your exception will be noted.

By Mr. VEAZEY.—We except further on the ground that the instructions do not cover all of the

issues. Our contention is that no one has a right to thrust himself upon the negligence, if any, of another. The answer specially pleads that, that whatever dangers there were existing, the plaintiffs, or their representative knew, and at least had the last clear chance to avoid it in the exercise of reasonable care; and the proof shows that there were other ways by which the Ennis ranch could be reached, and the instructions do not cover that phase at all.

Your Honor has limited the issue of contributory negligence to the manner of driving, and has not charged the jury as to the duty of the driver or the plaintiffs in any way to avoid the alleged negligence of the defendant, not only in the manner of driving, but by using another road, or in any other respect. In fact, the Court charges the jury that the last clear chance doctrine as regards the plaintiffs' negligence, and any negligence of the driver, other than his manner of driving, may be laid aside.

By the COURT.—In the light of the testimony as to the use made of the road, I do not think the driver was bound to use another road; by placing the carcass there you cannot foreclose him from using that road. Your exception will be noted.

Let each and all of the exceptions be noted.

By Mr. VEAZEY.—I have assumed that each party has an exception to each instruction refused.
[188—126]

By the COURT.—If you take it.

By Mr. VEAZEY.—We take an exception as to each instruction refused.

By the COURT.—Your exception will be noted.

Thereupon the jury retired to consider of its verdict, and thereafter returned into court with its verdict in favor of the plaintiffs and against the defendant, and assessing the plaintiffs' damages in the sum of Eight Thousand Dollars (\$8,000).

Thereafter, by stipulations of the parties and by orders of the above-entitled court, duly given and made, the time within which defendant might prepare and serve its bill of exceptions was extended to and including October 10th, 1914.

And now, therefore, in furtherance of justice, and that right may be done, the defendant presents the foregoing as and for its bill of exceptions to the rulings made and the proceedings had on the trial of the above-entitled cause, and prays that the same may be settled and allowed, and signed and certified by the judge of the above-entitled court, who tried said cause, as provided by law.

VEAZEY and VEAZEY,
Attorneys for Defendant, Great Northern Railway
Company.

Admission of Service of Bill of Exceptions.

DUE PERSONAL SERVICE of the foregoing bill of exceptions made and admitted, and receipt of copy, acknowledged this 10th day of October, A. D. 1914.

R. O. LUNKE,
WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs. [189—127]

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATION AND AGREED that the foregoing bill of exceptions is true and cor-

rect, and that the same may be settled and allowed, and signed and certified as defendant's bill of exceptions to the rulings made and proceedings had on the trial of the above-entitled cause.

Dated January 2d, 1915.

WALSH, NOLAN and SCALLON,

Attorneys for Plaintiffs. [190—128]

*In the District Court of the United States for the
District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY CO. et al.,

Defendants.

Order Settling and Allowing Bill of Exceptions.

This cause coming on regularly before the Court upon the application of the defendant, Great Northern Railway Company, for the settling and allowance of its proposed Bill of Exceptions herein heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of the Court, and the plaintiff, by his attorneys, having proposed amendments thereto and said amendments adopted by the Court having been incorporated in said bill;

It is now ordered that the foregoing Bill of Exceptions be and it is hereby settled and allowed as a true Bill of Exceptions in this cause as prayed, and the same is now certified accordingly by the undersigned, the presiding Judge of said court, who tried

said cause, and it is ordered that the same be filed *nunc pro tunc* as of July 2d, A. D. 1914, and made a part of the record herein.

Done in open court this 2d day of January, A. D. 1915, and ordered entered as above.

GEO. M. BOURQUIN,

United States District Judge for the District of
Montana.

After hearing defendant's argument on motion for a new trial made immediately after the above certificate signed, and [191] discovering the chief ground relied upon, the Court examined the bill and finds it defective, incomplete and unsatisfactory. It has corrected it in several particulars, pages 61, 69, 70, 88, 93, 94, 95, 110, but the instructions especially are subject to the above criticism, though doubtless not to be remedied. The Court knows the great difficulty the stenographer has in noting the Court's remarks, and the greater, transcribing them. The Court's earlier certificate is to be read herewith.

Jan. 12, 1915.

BOURQUIN, J.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Filed Jan. 14, 1915. Geo. W. Sproule, Clerk. [192]

Thereafter, on March 10, 1915, defendant Railway Company filed its Assignment of Errors herein, as follows, to wit: [193]

*In the District Court of the United States, in and for
the District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY et
al.,

Defendants.

Assignment of Errors.

Comes now Great Northern Railway Company, the defendant in the above-entitled cause and, pursuant to its petition for a writ of error, filed herein, makes and files this its assignment of errors setting forth why the judgment herein should be reviewed on writ of error and reversed, and says that the Court was in error in the particulars following and that it, the said defendant herein, plaintiff in error in the Circuit Court of Appeals, will rely upon the following errors in the prosecution of said writ, to wit:

I-A.

It was error in the Court to overrule defendant's motion to strike certain portions and the whole of plaintiff's First Amended Complaint.

I-B.

It was error in the Court to overrule defendant's motion to strike certain portions and the whole of

plaintiff's Second Amended Complaint.

II-A.

It was error in the Court to overrule defendant's demurrer to the Second Amended Complaint herein.

II-B.

It was error in the Court to overrule defendant's objection to the introduction of evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. [194]

II-C.

It was error in the Court to overrule defendant's motion for a nonsuit at the close of the plaintiffs' case.

II-D.

It was error in the Court to refuse defendant's request for an instruction to return a verdict for the defendant.

II-E.

It was error in the Court to refuse defendant's requested instruction numbered 1A, as follows:

"No. 1A. You are instructed to return a verdict for the defendant Great Northern Railway Company."

III-A.

It was error in the Court to refuse defendant's requested instruction numbered 2A, as follows:

"No. 2A. You are instructed that even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that at the time of the runaway the defendant railway company was absent and that Dr. Ennis, one of the

plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, if any, and had the last clear chance, by the exercise of reasonable care to avoid such negligence, if any, and failed to do so and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof and the death of the deceased was not proximately caused by such negligence, if any."

III-B.

It was error in the Court to refuse defendant's requested instruction numbered 2B, as follows:

"No. 2B. You are instructed that, even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that at the time of the runaway the defendant railway company was absent and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, or by the exercise of reasonable care might have discovered the same, and had the last clear chance, by the exercise of reasonable care to avoid such negligence, if any, and failed to do so and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof, and the death of the deceased was not proximately caused by such negligence, if any."

III-C.

It was error in the Court to refuse defendant's requested instruction numbered 2C, as follows:
[195]

"No. 2C. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place and is no longer present and some one approaches such place and discovers, or by the exercise of reasonable diligence might have discovered the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause and in the occurrence of which its negligence was merely a condition or circumstance."

III-D.

It was error in the Court to refuse defendant's requested instruction numbered 2D, as follows:

"No. 2D. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place and is no longer present and some one approaches such place and discovers the negligence of such defendant and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in

law deemed not a cause of such person being injured by such dangers but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause and in the occurrence of which its negligence was merely a condition or circumstance.”

III-E.

It was error in the Court to refuse defendant's requested instruction numbered 3E, as follows:

“No. 3E. Even if you find that the defendant railway company was negligent in any of the matters complained of, nevertheless, you cannot return a verdict for the plaintiffs if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees, knew, or discovered, or in the exercise of reasonable care should have known or discovered said negligence, if any, of said defendant and had the last clear chance to avoid the same and negligently failed to avoid the same. If such is the case, then the negligence, if any, of said defendant is in law but a condition surrounding the accident and not, in law, a proximate cause of the accident, for no one is after discovering or having the means of discovering that another has been negligent entitled to thrust himself upon the negligence of another or blindly refuse to discover the negligence of another and if he does so, it is, in law, his own act or omission and not the negligence of the defendant which is the proximate cause of the injury.”

III-F.

It was error in the Court to refuse defendant's requested instruction numbered 3F, as follows:

"No. 3F. If you find from the evidence that the defendant railway company placed or negligently permitted to remain, at the place narrated in the complaint, the carcass of a horse so that it was an object likely to frighten horses driven upon the roadway [196] in question, such negligence, if any, on the part of said defendant would not be a proximate cause of the runaway and of the damages, if any, caused by the death of the deceased, if you further find that the deceased, or the plaintiffs, or either of them, his, her or their agents or employees, knew of and discovered said negligence, if any, or by the exercise of reasonable care should have known or discovered the same, or had the last clear chance to avoid the same and negligently failed to do so. Under such circumstances the negligence, if any, of the defendant railway company would be a mere condition or circumstance of the runaway but not a cause thereof."

IV-A.

It was error in the Court to charge the jury as follows:

"Defendant furthermore sets up a plea of contributory negligence, that is to say, it alleges that if it was negligent in and about the situation of this carcass, that when the plaintiffs' driver Bigelow took the wife through that place, he was negligent in his driving, and that this negligence contributed to

the injury, and without it the injury would not have happened.

“Now at this point comes this proposition: The issue in reference to the contributory negligence alleged against the driver Bigelow, and, in reference to that, all the Court has heard in the way of evidence is that Bigelow had been drinking that day.

“Contributory negligence means that a party who is laying a claim against another person for his negligence, was himself lacking in ordinary care due for his own safety. In other words, even though the defendant was negligent in leaving the carcass there, and even though it frightened the team, yet if Bigelow had driven with ordinary care and thus prevented the accident, then his negligence contributed to the injury. Unless you find by a preponderance of the evidence that he did not so drive, why, you put the question of contributory negligence out of sight.”

IV-B.

It was error in the Court in its charge to rule that the doctrine of the last chance had no application to this case and to limit the issue of contributory negligence to the method of driving, and to instruct the jury that other matters of contributory negligence, such as the duty of the deceased not to thrust herself upon defendant's negligence, might be laid aside, and not to charge that the deceased had no right to thrust herself upon the negligence of the defendant, as the answer pleads, and the proof shows that whatever dangers existed the deceased and her agents knew of them, or had the last clear chance, by the

exercise of reasonable care, to avoid them.

IV-C.

It was error in the Court to overrule the following exception and objection to the Court's charge: [197]

"We except further on the ground that the instructions do not cover all of the issues. Our contention is that no one has a right to thrust himself upon the negligence, if any, of another. The answer specially pleads that, that whatever dangers there were existing, the plaintiffs, or their representative knew, and at least had the last clear chance to avoid it in the exercise of reasonable care; and the proof shows that there were other ways by which the Ennis ranch could be reached, and the instructions do not cover that phase at all.

"Your Honor has limited the issue of contributory negligence to the manner of driving, and has not charged the jury as to the duty of the driver or the plaintiffs in any way to avoid the alleged negligence of the defendant, not only in the manner of driving, but by using another road, or in any other respect. In fact, the Court charges the jury that the last clear chance doctrine as regards the plaintiffs' negligence, and any negligence of the driver, other than his manner of driving, may be laid aside.

"By the COURT.—In the light of the testimony as to the use made of the road, I do not think the driver was bound to use another road; by placing the carcass there you cannot foreclose him from using that road. Your exception will be noted."

V-A.

It was error in the Court to refuse defendant's

requested instruction numbered 4A, as follows:

“No. 4A. You are instructed that the evidence does not show and is legally insufficient to establish that the place where said Nettie Ennis and John Bigelow attempted to drive across the railroad track of the defendant railway company, was anything other than a roadway by invitation of the railway company.”

V-B.

It was error in the Court to refuse defendant's requested instruction numbered 4B, as follows:

“No. 4B. The railway company was not, in any event under any absolute duty to remove the carcass in question, if you find that the carcass caused the runaway; it was at least under not more than an alternate duty, that is to say, to exercise reasonable care to remove the carcass or to exercise reasonable care to give warning of the dangers, if any, which might arise from its presence, if you find that such dangers existed. And, in this connection, a knowledge by any person of such dangers, if any, or the fact, if it is a fact, that, in the exercise of reasonable care, such person would know of such dangers, if any, would dispense with any necessity of giving such person warning.”

V-C.

It was error in the Court to refuse defendant's requested instruction numbered 4D, as follows:

“No. 4D. You are instructed that under the evidence in this case the defendant railway company was, as regards that portion of the roadway crossing its tracks and on its property, entitled to have there

such articles or objects as it saw fit, provided that it gave warning thereof to persons using the crossing and in the event that any such person knew of the presence [198] thereof, and of the dangers, if any, flowing therefrom, this would dispense with any duty to give warning as to such person, and such person using the crossing with the knowledge aforesaid would do so at his own risk, if any, and defendant could not be liable to him for damages, if any, thereby sustained.”

VI-A.

It was error in the Court to charge the jury as follows:

“In this case it appears that there was a traveled way along the railroad track, across the railroad track; that it was generally treated in the community as a public highway; that the people who had occasion to travel that way used it; that the county authorities treated it as a highway, maintained it as such, and at the point where it crosses the railroad track, the railway company had planked the way, making it easier to cross, and they had put up cattle-guards, as is customary, on each side of the railroad, and these cattle-guards had run out to the side fences, the same as on highways. The Court will say to you that while this was not a legal highway, in that it had not been laid out by the county, with all the requirements of the law, as it is agreed, by the authorities, yet to all intents and purposes, this was a public highway, and imposed upon the defendant the same duties in relation to it that would be imposed upon it in connection with a legal highway,

and conferrred upon the plaintiffs, and the deceased woman, the wife of Herbert L. Ennis, the same rights to travel that she would have to travel on any public highway.”

VI-B.

It was error in the Court to instruct the jury that the way in question was treated by all parties as a public highway, and not to define the measure of responsibility in the event that the jury should find that the way in question was merely a way by invitation.

VII-A.

It was error in the Court to charge the jury as follows:

“Briefly the issues in this case are: Is the defendant responsible at all for the placing of this carcass at the place where the evidence shows it was? In brief, it might be, did the defendant’s railway train kill and throw this carcass in that position along this roadway? If that issue is determined against the defendant, then the next question would be, whether or not, in so allowing it to remain there, the defendant was negligent.”

“In this case, if you find that the defendant had killed this horse by one of its trains, and threw it down below the traveled part of this sixty-foot highway across its line, and left it there from January or December, until April, and that when April came, on the day when this lady was crossing there, the appearance of the carcass, and the odors from it were such as tended to frighten the ordinary teams that would pass over the highway, and teams of or-

dinary gentleness and training, why, you would be justified in finding that the defendant was negligent in leaving the carcass there, under those circumstances."

VII-B.

It was error in the Court to instruct the jury that the [199] railway company placed the carcass near the roadway, if the horse was killed by being struck by a train and thrown there, irrespective of whether or not the railway company was negligent in the operation of the train, and without proof of any act of the railway company justifying the submission of such an issue as to the placing of the carcass.

VII-C.

It was error in the Court to overrule the following objection and exception to the Court's charge, to wit:

"In regard to the placing of the carcass, your Honor has instructed the jury that, if the carcass was placed there by being struck by a train that would consist of the act of placing the carcass. We except on the ground that the act of placing the carcass has not been proven, and there is no proof of such a fact. We also except on the ground that we should not be liable for the placing of the animal unless we were negligent in the placing in the first place; that is, unless it amounts to negligence in the operation of the train that struck it."

VII-D.

It was error in the Court to instruct the jury, as follows:

“The test will be whether a man of average common sense would know that it would have a tendency to frighten animals at that place. And if it would, if the average reasonable man would know it, then the defendant company would be taken to know it.

“Of course, if it is an unusual circumstance, something that no reasonable man would expect to follow from leaving the carcass there, that is a different proposition. The defendant would not be liable; but it is left to your sound sense and judgment to say whether or not in that condition at that time and place and under the circumstances of the road crossing, whether or not the average reasonable man would know that this was a dangerous object, as I have defined it; if so, the railroad company would be liable, otherwise not.”

VII-E.

It was error in the Court to overrule the following objection and exception to the Court's charge in Assignment VII-D above:

“The Court instructed the jury that if the carcass had that tendency to frighten animals, the railroad company would have been negligent. We contend that the jury should have been instructed that it would be also necessary for the plaintiffs to establish that the railway company knew of this tendency, or, in the exercise of reasonable care, should have known of it. Your Honor has said that that would be the fact, whether or not the railroad company should have known of the condition there. Your Honor should charge, in addition to what your

Honor has said, that the railway company would not be negligent unless *in its situation it knew, or should have known*, of the alleged fact as to the tendency of the carcass." [200]

VIII-A.

It was error in the Court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (the plaintiff in the case) that he knew that the driver Bigelow, prior to the accident, was a man given to the use of intoxicating liquors to excess."

VIII-B.

It was error in the Court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (William Gardner) that the driver Bigelow was at all times prior to the accident addicted to the habitual and excessive use of intoxicating liquors, and was, to the knowledge of the witness, usually under the influence of excessive use of liquor, sufficient to make dull his senses whenever, prior to the accident, he came to Bainville at any time prior thereto six months before the accident."

VIII-C.

It was error in the Court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (Charles Hubener) that for about a year previous to Bigelow's starting to work for Dr. Ennis, Bigelow was working for the witness in the saloon business as a bartender; that witness offered during the said period to give Bigelow a share in the

business if he would keep sober and not get intoxicated, but that Bigelow was nearly always during said period so intoxicated that he could not attend to the business, and finally the witness discharged him because the witness had observed that he was an habitual drunkard."

IX-A.

It was error in the Court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (Charles Hubener) that shortly after the accident, the witness was talking with Bigelow about the accident, and that Bigelow then told him that it was a piece of paper that caused the horses to run away, and not the carcass referred to in the testimony."

IX-B.

It was error in the Court to deny the defendant the right to withdraw its disclaimer of any intention to impeach the witness Bigelow and to permit the plaintiffs to read into the evidence the following question propounded to, and the following answer given by, the witness Bigelow: [201] .

"Q. Did you ever, at any time or at any place, make any statement to anyone to the effect that this runaway had been caused by the horses becoming frightened at a piece of paper and not by the carcass?"

"A. No, sir."

IX-C.

It was error in the Court to overrule the following objection to the admission of the testimony of the

witness Bigelow on the former trial, and to admit said testimony:

“We object to the admission of the testimony of the witness Bigelow, taken on the former trial, because the transcript of his testimony constitutes mere hearsay, and the witness Bigelow himself must be called, and the inability to call him has not been sufficiently established, and because at the time Bigelow was examined at the time of the last trial, we did not have impeaching testimony, and we examined him at the last trial for the purpose of ascertaining if there was any impeaching testimony available, but since then we have secured impeaching testimony, and because also the transcript of his testimony is too uncertain to be intelligible, in that the witness referred to a plat and designated places upon a plat by such expressions as ‘here’ or ‘there,’ without marking the same on the plat or indicating in his testimony where the same were.”

X-A.

It was error in the Court to permit the cross-examination of the witness, Mrs. Charles Allison, shown in her deposition, to be read in evidence, defendant having waived it, and to overrule the following objection thereto:

“We object to the cross-examination of the witness, Mrs. Charles Allison being read in the evidence, because we have waived the same, and under the stipulation we have the right to waive the same, and thereupon it ceases to be cross-examination.”

X-B.

It was error in the Court to permit the plaintiffs

to read in evidence the following questions and answers in cross-examination:

“Q. Did Mrs. Ennis say anything to you at that time about his having had any liquor, or anything like that?”

“A. No, she did not.”

“Q. Did she say anything after the accident about him having had any liquor?”

“A. No, sir.”

“To which questions and answers the defendant objected, on the ground that it had waived the cross-examination, and therefore none of the cross-examination should be read in evidence, and in so far as the same is admitted as cross-examination, it is a cross-examination as to a matter concerning which the defendant was forced to enter, by reason of the improper questions asked in the [202] direct examination, in regard to the declaration of Mrs Ennis, there being, at the time the deposition was taken, no one present who could rule on the competency of said testimony, and said questions in cross-examination were asked merely for the purpose of developing anything that is pretended to have been said by Mrs. Ennis, we thus seeking to sound the reliability of the witness' testimony as regards the alleged conversation, and the same is hearsay, incompetent and irrelevant.”

X-C.

It was error in the Court to permit the plaintiffs to read in evidence the following question and answer in cross-examination and to overrule defendant's objection thereto, as follows:

“Q. Is there any discussion you heard around Bainville as to Mr. Bigelow being responsible for the accident?”

“A. No, sir; I have never heard a great deal said about it.”

To which question and answer defendant objected for the reason set forth in Assignment X-A.

X-D.

It was error in the Court to permit the plaintiffs to read in evidence the following question and answer in the cross-examination of the witness Mrs. Charles Allison, and to overrule defendant's objection thereto, as follows:

“Q. And during those conversations did she say anything about Mr. Bigelow having been drinking that day?”

Which said question was objected to for the reason set forth in the Assignment X-B.

“A. No, sir, she did not.”

X-E.

It was error in the Court to permit the plaintiffs to read in evidence the following question and answer in cross-examination:

“Q. Have you heard any of these people, whose names you mentioned to us, refer to Mr. Bigelow as in any way responsible for the accident?”

“A. No, sir.”

“To which question and answer the defendant objected, for the reason set forth in Assignment X-A.”

X-F.

It was error in the Court to permit the plaintiffs to read in evidence the recross-examination of the

witness, Mrs. Charles Allison, [203] for the reasons hereinbefore stated, and for the reason that the witness was cross-examined for the purpose of testing her knowledge as to matters testified to by her, there being no one present to rule upon the competency of her testimony.

XI.

It was error in the Court to sustain the following objection to the following question, and to overrule the following offer of proof:

“Q. Were you in attendance at the last trial as a witness for the plaintiffs?”

By the PLAINTIFFS.—We object to that as wholly immaterial.

By the DEFENDANT.—We offer to prove that at the last trial the witness was present and was called as a witness for the plaintiffs.”

XII-A.

In the trial there were irregularities in the proceedings of the Court and abuse of discretion on the part of the Court, by which the defendant was prevented from having a fair trial.

XII-B.

The Court was guilty of irregularities in the course of the trial, by which the defendant was prevented from having a fair trial.

XII-C.

The Court abused its discretion in the course of the trial, whereby defendant was prevented from having a fair trial.

XII-D.

The Court was guilty of irregularities and abused

its discretion in the course of the trial, whereby the defendant was prevented from having a fair trial, as follows:

1. On the matters resting generally and as separate rulings in the discretion of the Court, and on matters not of themselves separately assignable as errors the Court ruled so frequently adversely to the defendant that, though such rulings, as separate rulings, are not assignable as errors, the defendant was, by the number thereof, unduly hampered in the examination of witnesses and prejudiced in the eyes of the jury.

2. The Court unduly, unnecessarily, improperly, frequently and without justification, restricted defendant in the examination of witnesses and prevented defendant from fully presenting the testimony favorable to the defendant, and material, competent and relevant to its defenses. [204]

3. The Court unwittingly ridiculed before the jury defendant's defense that the driver Bigelow, referred to in the testimony, was under the influence of intoxicating liquor at the times complained of; the defense that the carcass did not give forth odor, and did not cause the runaway; the defense that the driver Bigelow had the last clear chance to avoid defendant's negligence, if any, and every defense interposed by defendant by statements made by the Court in the trial, first excluding testimony in support of these defenses, and by afterwards permitting some of such testimony to be received, accompanied by comments by the Court, adverse to such testimony, and otherwise causing the jury to believe that the

defendant's competent, material and relevant testimony was not such, and was admitted merely by the indulgence of the Court, and ought not and would not be considered by the jury, as affecting the case.

4. The Court in the trial permitted itself to assume, or appear to assume, a repeatedly harsh, hostile and prejudiced manner towards defendant, its witnesses and its counsel, whereby defendant was hampered in the examination of witnesses and prejudiced in the eyes of the jury.

5. In other respects, the Court was guilty of irregularities, and of abuse of discretion.

XIII-A.

The damages as fixed by the verdict of the jury are excessive, and appear to have been given under the influence of passion and prejudice.

XIII-B.

The evidence is insufficient to justify the verdict in the item of damages.

XIII-C.

It was error in the Court to rule that the re-marriage of the plaintiff immediately after the trial could not be considered by the jury in determining the excessiveness of the verdict.

WHEREFORE the defendant prays that said petition for a writ of error be granted, and that, for the reasons aforesaid and for divers and sundry other reasons, the judgment entered herein on the 2d day of July, 1914, the same also having been suspended by the filing of defendant's petition for a new trial on the 8th day of August, 1914, and re-entered by the order denying the defendant a new trial made

and entered herein on the 14th day of January, 1915,
be reversed.

Filed Mar. 10, 1915. Geo. W. Sproule, Clerk.

VEAZEY & VEAZEY,

Attorneys for Defendant, Great Northern Railway
Company, Plaintiff in Error. [205]

Thereafter, on March 10, 1915, Petition for Writ
of Error was filed herein, as follows, to wit: [206]

*In the District Court of the United States in and for
the District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
et al.,

Defendants.

Petition for Writ of Error.

Great Northern Railway Company, the defendant
in the above-entitled cause, conceiving itself ag-
grieved by the judgment rendered in the District
Court of the United States, in and for the District
of Montana, in said cause on the 2d day of July, A. D.
1914 (being the final and only judgment entered in
said cause), and complaining that in the record and
proceedings had in said cause, and also in the rendi-
tion of said judgment, manifest error hath happened,
to the great damage of said defendant, as more fully
appears from the Assignment of Errors, which is
filed with this petition, comes now and petitions the

above-entitled court for an order allowing said defendant to prosecute a Writ of Error out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that such Writ of Error may issue in this behalf out of said Circuit Court of Appeals, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals, under and according to the laws of the United States, in that behalf made and provided, and also that an order may be made fixing the amount of security which said defendant shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said Writ of Error by said United States Circuit Court of Appeals, and for such other and further order as to the Court may seem just.

Great Falls, Montana, March 10, 1915.

VEAZEY & VEAZEY,
Attorneys for Defendant.

Filed Mar. 10, 1915. Geo. W. Sproule, Clerk.

[207]

Thereafter, on May 10, 1915, Bond on Writ of Error was duly filed herein, being in the words and figures following, to wit: [208]

*In the District Court of the United States in and for
the District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
et al.,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That Great Northern Railway Company, by Veazey & Veazey, its attorneys, as principal, and National Surety Company, a corporation, duly organized and incorporated under the laws of the State of New York, (with the capital and assets provided for in an act of the Sixth Legislative Assembly of the State of Montana entitled "An act to Permit Foreign Surety Companies to do Business in this State and Regulating the Method Thereof," for the purpose, among other things, of transacting business as a surety on undertakings of persons and corporations, and the acts supplemental thereto or amendatory thereof, which said corporation has complied with all the provisions of said act and acts), as surety, are held and firmly bound unto Herbert L. Ennis and Guy W. Ennis, the plaintiffs in the above-entitled cause, their executors, administrators and assigns, in the penal sum of Eleven Thousand (\$11,000.00) Dollars, for the payment of which amount well and

truly to be made to the said plaintiffs, their executors, administrators and assigns, the said principal and surety bind themselves, their successors and assigns, jointly and severally, firmly, by these presents.

Dated this 10th day of March, A. D. 1915.

THE CONDITION OF THE FOREGOING OBLIGATION IS SUCH THAT:

WHEREAS, the above-named Great Northern Railway Company has prosecuted, or is about to prosecute, a Writ of Error out of the United States Circuit Court of Appeals for the Ninth Circuit to have reviewed by said United States Circuit Court of Appeals, and to reverse the [209] judgment in the above-entitled cause rendered and entered by the United States District Court for the District of Montana on the 2d day of July, A. D. 1914, in favor of the plaintiffs and against the defendant, Great Northern Railway Company.

NOW, THEREFORE, if the above-named Great Northern Railway Company, defendant in said cause and plaintiff in error, shall prosecute its said Writ of Error to effect and answer all damages and costs if it should fail to make its plea good, then this obligation shall be void, otherwise it shall remain in full force and virtue.

GREAT NORTHERN RAILWAY COMPANY,

By VEAZEY & VEAZEY,

Its Attorneys.

NATIONAL SURETY COMPANY,

[Corporate Seal]

By W. S. FRARY,

Its Duly Authorized Attorney in Fact.

The foregoing bond is hereby approved as to form and sufficiency and in all things, this 10th day of March, A. D. 1915.

BOURQUIN,
United States District Judge for the District of
Montana.

Filed Mar. 10, 1915. Geo. W. Sproule, Clerk.
[210]

Thereafter, on March 10, 1915, an Order Allowing Writ of Error was duly entered herein, as follows, to wit: [211]

*In the District Court of the United States in and for
the District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
et al.,

Defendants.

Order Allowing Writ of Error.

At a stated term, to wit, the November term, A. D. 1914, of the District Court of the United States in and for the District of Montana, held at the city of Helena, in the State and District of Montana, on the 10th day of March, A. D. 1915.

Present, the Hon. GEORGE M. BOURQUIN,
District Judge.

This day came the defendant, Great Northern Railway Company, by its attorneys, and filed herein

and presented to the Court, and its judge, the petition of said defendant praying for the allowance of a Writ of Error out of the United States Circuit Court of Appeals, in and for the Ninth Circuit, and an Assignment of Errors setting forth the errors intended to be urged by said defendant, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, in and for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof the Court does allow said Writ of Error, and it is ordered that a Writ of Error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore rendered and entered herein on the 2d day of July, A. D. 1914, being a day of the April term of said District Court, and that the amount of bond on said Writ of Error be and hereby is fixed at the sum of Ten Thousand Dollars, which said bond shall operate as [212] a supersedeas bond, and that upon said defendant, Great Northern Railway Company, plaintiff in error, filing with the clerk of this court a good and sufficient bond in the said sum of Ten Thousand Dollars, approved by this Court, or its judge, execution on said judgment shall be, and hereby is, stayed and all further proceedings in this Court shall be, and they hereby are, suspended and stayed until the determination of said Writ of Error by said United

States Circuit Court of Appeals.

Done in open court this 10th day of March, A. D. 1915, and ordered entered as above.

GEO. M. BOURQUIN,
United States District Judge for the District of
Montana.

Filed and entered March 10, 1915. Geo. W. Sproule, Clerk. [213]

Thereafter, on March 10, 1915, a Writ of Error was issued herein, which Writ of Error is hereto annexed, and is in the words and figures following, to wit: [214]

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable
the District Court of the United States, for the
District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in said District Court before you, or some of you, between Herbert L. Ennis and Guy W. Ennis, defendants in error and plaintiffs in said District Court, and Great Northern Railway Company, plaintiff in error and defendant in said District Court, manifest error hath happened to the great damage of said defendant, and plaintiff in error, Great Northern Railway Company, as by its petition and Assignment of Errors appears, we, being willing that error, if any

there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date of this Writ, in said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, and the seal of the District Court of the United States [215] for the District of Montana, this 10th day of March, in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the United States the one hundred and thirty-ninth.

[Seal]

GEO. W. SPOULE,
Clerk of the United States District Court for the
District of Montana.

Due personal service of the foregoing Writ of Error made and admitted and receipt of copy acknowledged this 15th day of March, A. D. 1915.

WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs in said District Court and
Defendants in Error.

Copy lodged for Plaintiffs this 10th day of March,
A. D. 1915.

GEO. W. SPROULE,
Clerk of said United States District Court. [216]

Answer of Court to Writ of Error.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing Writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

GEO. W. SPROULE,
Clerk. [217]

[Endorsed]: No. 960. In the District Court of the United States in and for the District of Montana. Herbert L. Ennis et al., Plaintiffs, vs. G. N. Ry. Co., Defendant. Writ of Error. Filed March 17, 1915. Geo. W. Sproule, Clerk. [218]

Thereafter, on March 10, 1915, a Citation was duly issued herein, which Citation is hereto annexed, and is in the words and figures following, to wit:
[219]

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

Citation on Writ of Error

UNITED STATES OF AMERICA,—ss.

The President of the United States, to HERBERT
L. ENNIS and GUY W. ENNIS, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, and at a session thereof, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Writ of Error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein Great Northern Railway Company, defendant in said District Court, is plaintiff in error, and you, the said Herbert L. Ennis and Guy W. Ennis, plaintiffs in said District Court, are defendants in error, to show cause, if any there be, why the judgment rendered against said defendant, plaintiff in error, and in favor of said plaintiffs, defendants in error, in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Hon. GEORGE M. BOURQUIN,
United States District Judge, for the District of
Montana, this 10th day of March, A. D. 1915.

BOURQUIN,
United States District Judge for the District of
Montana.

Due personal service of the foregoing Citation
made and admitted and receipt of copy acknowl-
edged this 15th day of March, A. D. 1915.

WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs in said District Court and
Defendants in Error. [220]

[Endorsed]: No. 960. In the District Court of
the United States in and for the District of Mon-
tana. Herbert L. Ennis et al., Plaintiffs, vs. G. N.
Ry. Co., Defendant. Citation on Writ of Error.
Filed March 17, 1915. Geo. W. Sproule, Clerk.
[221]

Thereafter, on March 19, 1915, an Order as to ex-
hibits was made and entered herein, as follows, to
wit:

*In the District Court of the United States in and for
the District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY CO. et al.,

Defendants.

Order Directing Transmission of Original Exhibits.

It appearing to the undersigned, the presiding

Judge of the above-entitled court, presiding in the above-entitled cause at the trial thereof, that it is proper that the original exhibits used on the trial of the above-entitled cause, or referred to in the bill of exceptions herein to the rulings made and proceedings had on said trial, should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, upon the writ of error sued out by the above-named defendant to have reviewed the judgment of the above-entitled court by the said Circuit Court of Appeals;

On motion of counsel for defendant Great Northern Railway Company, and pursuant to stipulation,

It is ordered that the clerk of the above-entitled court transmit to said Circuit Court of Appeals the said original exhibits introduced in evidence, consisting of all photographs offered and received in evidence on the trial of the above-entitled cause, and of a plat or sketch of the location of the accident referred to in the complaint, so that said clerk may have the same in the said Circuit Court of Appeals with the transcript of the record in this cause.

Dated March 19, 1915.

GEO. M. BOURQUIN,

District Judge.

Filed and entered March 19, 1915. Geo. W. Sproule, Clerk. [222]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 223 pages, numbered consecutively from 1 to 223, inclusive, is a full, true and correct transcript of the original Amended Complaint, Second Amended Complaint, Demurrer to Second Amended Complaint, Order overruling Demurrer, Answer to Second Amended Complaint, Reply, Verdict, Judgment, Bill of Exceptions to order allowing amendment to original complaint, which contains a copy of the original complaint, Bill of Exceptions on motion to strike amended complaint, Bill of Exceptions on motion to strike second amended complaint, Bill of Exceptions to rulings made at trial, Assignment of Errors, Petition for Writ of Error, Bond, Order Allowing Writ, and Order as to Exhibits, now remaining on file and of record in my office as such clerk; and I further certify that I have annexed to said transcript and included within said paging the original Writ of Error and Citation issued in said cause, and that I transmit herewith the original exhibits referred to in the above-mentioned order.

I further certify that the costs of the transcript of record herein amount to the sum of Thirty-three

50/100 Dollars (\$33 50/100), and have been paid by plaintiff in error.

In Witness whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 27th day of March, A. D. 1915.

[Seal]

GEO. W. SPROULE,

Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
3/27/1915. G. W. S.] [223]

[Endorsed]: No. 2598. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Plaintiff in Error, vs. Herbert L. Ennis and Guy W. Ennis, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed April 6, 1915.

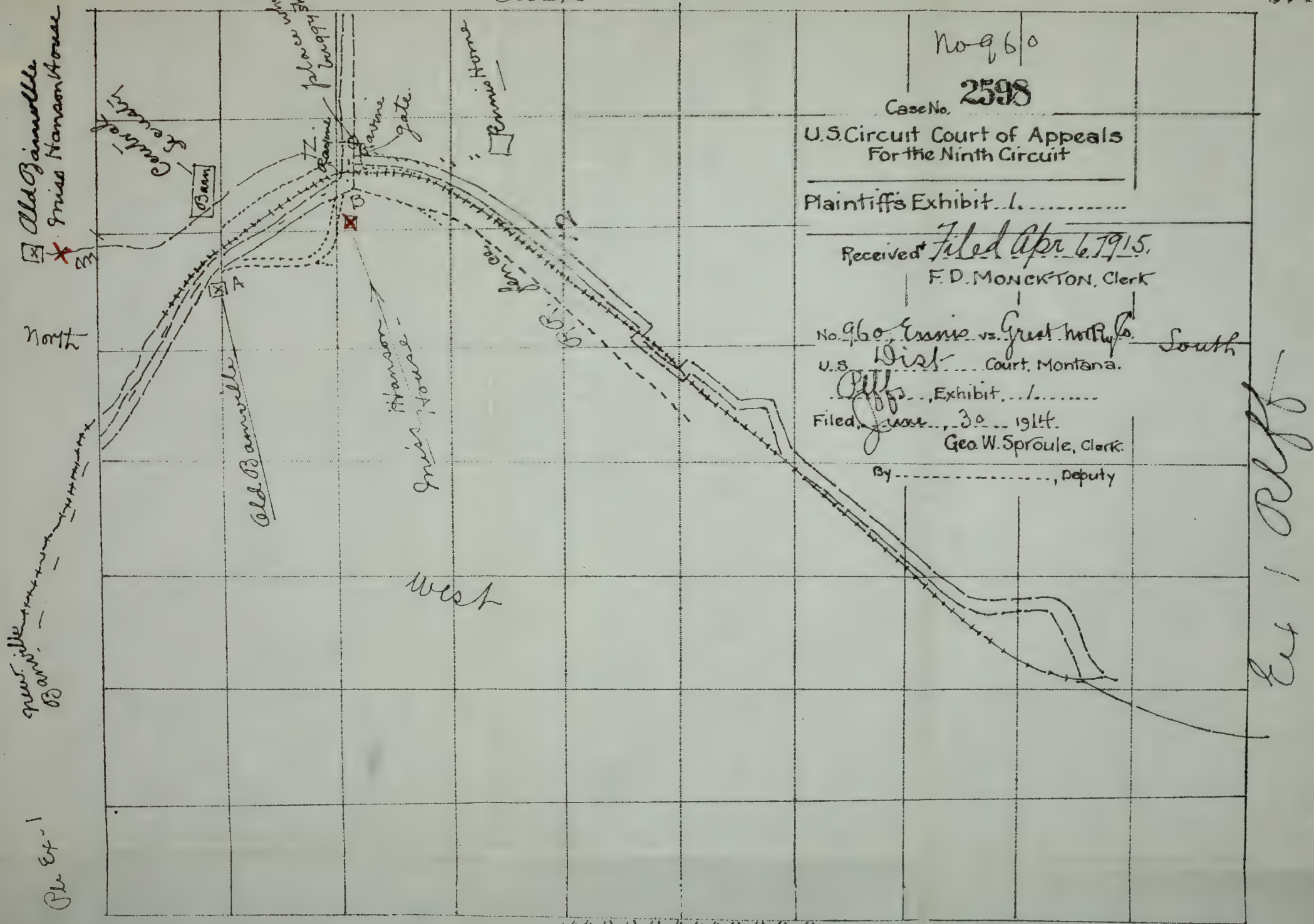
FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

East



No 960

2598

Case No.

U.S. Circuit Court of Appeals
For the Ninth Circuit

Plaintiffs Exhibit 1

Received *Filed Apr 6, 1915.*

F. D. MONCKTON, Clerk

No. 960 *Ennis vs. Great Northern Co.*
U.S. Dist. Court, Montana.

Plffs, Exhibit 1

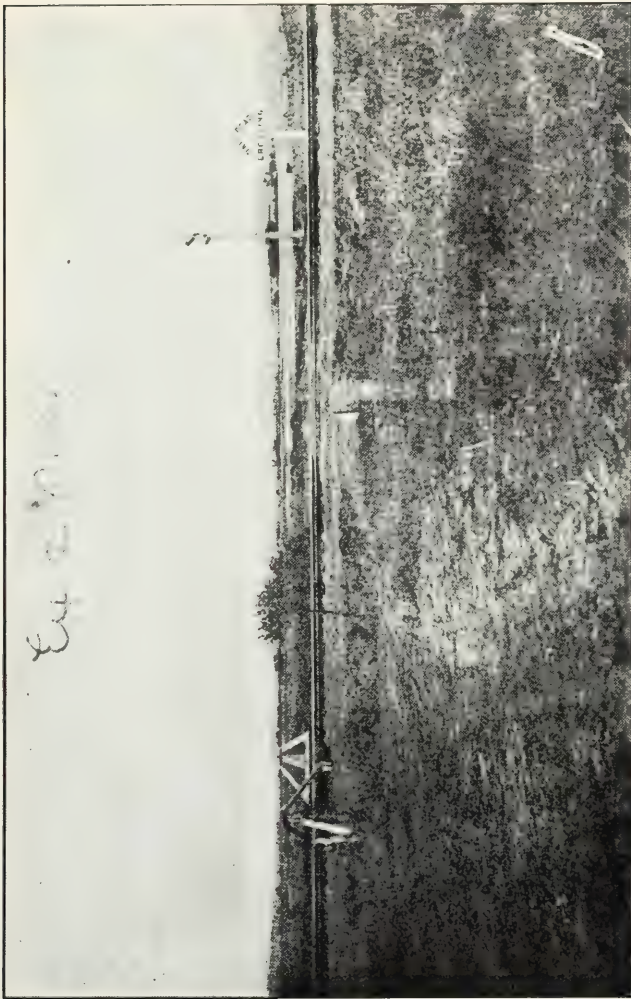
Filed *June 30*, 1914.
Geo. W. Sproule, Clerk.

By _____, Deputy

Ennis vs. Great Northern Co.

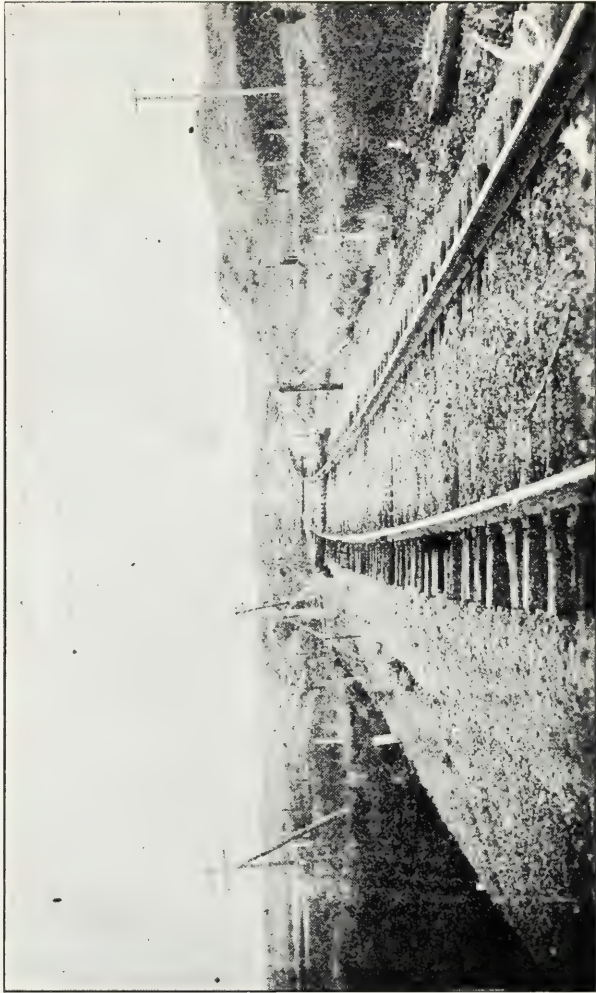


Plaintiffs' Exhibit No. 2.



[Endorsed]: No. 960. Ennis vs. Great Nor. Ry. Co. U. S. District Court, Montana. Plffs'. Exhibit 2. Filed June 30, 1914. Geo. W. Sproule, Clerk. By _____, Deputy.

No. 2598. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 2. Received and filed Apr. 6, 1915. F. D. Monckton, Clerk.

Plaintiffs' Exhibit No. 3.

[Endorsed]: No. 960. Ennis vs. Great Nor. Ry. Co. U. S. District Court, Montana. Plffs'. Exhibit 3. Filed June 30, 1914. Geo. W. Sproule, Clerk. By ———, Deputy.

No. 2598. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 3. Received and filed Apr. 6, 1915. F. D. Monekton Clerk.

Plaintiffs' Exhibit No. 4.



[Endorsed]: No. 960. Ennis vs. Great Nor. Ry. Co. U. S. District Court, Montana. Plffs'. Exhibit 4. Filed June 30, 1914. Geo. W. Sproule, Clerk. By _____, Deputy.

No. 2598. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiffs' Exhibit 4. Received and filed Apr. 6, 1915. F. D. Monekton, Clerk.

DEFENDANT'S EXHIBIT 5

Exhibit 5
Def.

No. *10* vs
U.S. Court, Montana
Exhibit
Filed, 19
Geo. W. Sproule, Clerk
By, Deputy

Defendant

To Bamville.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

vs.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

Supplemental Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Montana.

*In the District Court of the United States in and for
the District of Montana.*

No. 960.

HERBERT L. ENNIS, et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY,
Defendant.

BE IT REMEMBERED, that on November 3d, 1915, the above-named defendant, Great Northern Railway Company, filed in said cause its praecipe for a Supplemental Transcript on Writ of Error herein, as follows, to wit: [1*]

*In the District Court of the United States in and for
the District of Montana.*

No. 960.

HERBERT L. ENNIS, et al.,

Plaintiffs,

vs.

G. N. RY. CO.,

Defendant.

Praecipe [for Supplemental Transcript of Record].

The clerk of said court will please send to the Circuit Court of Appeals at San Francisco, the following papers (part of the record of the proceedings herein, under rule 14 of said court) omitted from the previous praecipe, as a supplement to the transcript on the writ of error herein, to wit:

*Page-number appearing at foot of page of Original Certified Transcript of Record.

(1) Opinion of the Court on sustaining demurrer to 1st amended complaint.

(2) Opinion of the Court on overruling petition for a new trial.

(3) Plaintiffs' proposed amendments to defendant's bill of exceptions taken at the trial.

(4) Order of Nov. 18, 1914, in minute book, showing settlement of bill and argument of motion for a new trial.

Dated Nov. 3d, 1915.

VEASEY & VEASEY,
Attorneys for Defendant.

Filed Nov. 3d, 1915. Geo. W. Sproule, Clerk.
[2]

No. 960.

HERBERT L. ENNIS and GUY W. ENNIS,
Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation, and JOHN HAMILTON,
Defendants.

Order and Decision.

The demurrer to the amended complaint herein is hereby sustained.

The case presented by the amended complaint is one of implied invitation by the defendant company to the general public to use a way prepared by it for that purpose across its premises, and nothing more. The crossing having been by the defendant company prepared like a public highway, nothing more was

necessary to make the use thereof by implied invitation. For all that appears, the public and the plaintiffs's intestate had full knowledge that the crossing was of that character. The crossing is alleged to be a private way used by the public. The rule is well settled that a user of such a way, like any invitee upon any other premises of another, takes the hazard of all patent defects therein and is entitled to protection only against wilful injury or snares or dangers known to the owner and not to the invitee. *Thomp., Neg. sec. 1015, 1228; 1 Add. Torts, sec. 258; Ry. Co. vs. McDonald, 152 U. S. 269; Montague v. Hanson, 38 Mont. 384.* Those who are not content therewith can decline the invitation. [3]

In this case the defect is alleged to have existed, exposed to view, for nearly four months. It follows the amended complaint shows no duty violated by the defendant company, and hence the question of contributory negligence and pleading thereof is not involved. This ruling follows from a reasonable construction of the complaint, taking it as having set out the case as favorable to plaintiff as the facts will bear. The complaint will not bear the construction, though it shadows it, that the defendant company held out the crossing as a highway, inducing the public and plaintiffs' intestate to believe it was a highway and to use it as such, which, under settled principles of law, would impose on said company co-extensive duty and liability.

See 29 Cyc. 451; *Plumer v. Dill*, 31 N. E. (Mass.) 130; *Sweeney v. Ry. Co.*, 87 Am. Dec (Mass.) 652; *Beck v. Carter*, 23 Am. Rep. (N. Y.) 182.

June —, 1912.

GEO. M. BOURQUIN,

Judge.

Filed June 29, 1912. Geo. W. Sproule, Clerk.

[4]

[**Opinion on Motion for a New Trial.**]

United States District Court, Montana.

ENNIS vs. RY. CO.

Defendant's motion for a new trial is urged mainly upon the ground that the Court's conduct during the trial prejudiced the jury against defendant. At the close of the testimony defendant excepted generally that the Court "ruled against us too frequently and has hampered us in the examination of witnesses and your Honor's demeanor toward us may have affected the jury." All this was taken as a challenge to the Court's rulings and as counsel's inference that this hampered his examination and constituted improper demeanor and attitude on the part of the Court. Upon argument herein few rulings have been questioned, but now it is urged the demeanor and attitude complained of is that the Court "unwittingly ridiculed before the jury every defense interposed by the defendant." In aid of this, counsel points out observations by the Court in rulings and otherwise, contained in the bill of exceptions, and requests the Court to "remember the tone of voice in which they were made." In view thereof

the bill of exceptions has been scrutinized and to some extent corrected by the Court of its own motion, to accord with the facts. For instance, the first correction on page 61 was of purported comment inane in extreme; the second on said page was of like comment involving stultification in view of the earlier attitude of the Court set out on pages 57, 58. That on page 69 supplies an omission of importance in view of the complaint in respect to what immediately followed. And others are to meet failures to secure, transcribe or insert accurately all material that occurred. Even as it is, the bill is unsatisfactory from omissions and inaccuracies perhaps tending to false impressions. [5]

The Court's comments are given a restricted and abrupt aspect contrary to the fact. All that was said and done is not definitely remembered, and the Court knows the stenographer's great difficulty in securing all, and greater, in transcribing it. The bill is doubtless as correct in its material aspect as can now be arrived at. But the Court also knows that neither in language, tone or demeanor did it display ridicule or other improper emotion or sentiment towards defendant or its counsel or cause. It did not perceive and does not believe the jury was prejudiced against defendant. If it was, however, the Court inclines to believe it was due to counsel's tactics, for instance, repeated demands that plaintiff perform a miracle for his benefit by instantly producing a witness from without the State, and the like, or by his lack of tact in bluntly arguing to the jury that plaintiff was not entitled to a substantial

recovery in that "a wife is a liability and not an asset," and iterating and reiterating this harsh and impossible contention until made ridiculous by opposing counsel's withering sarcasm and comment that doubtless plaintiff should be grateful for that defendant urged no counterclaim for services in relieving plaintiff of an incubus by killing his wife. The rebuke administered to counsel of which he mainly complains was invited and compelled by his over-zeal throughout the trial, perhaps unwittingly, in insisting upon argument after objections ruled upon, under the guise of "stating our position," "stating our view of the law," etc., and to a far greater extent than the bill of exceptions discloses. Not only does this misdirected energy grow wearisome, but persistent statements by counsel before the jury of his views of law opposed to the Court's rulings, are highly improper in that at the close of a long trial, [6] in the jury-room the jury is apt to confuse counsel's law with the Court's instructions and follow the former by mistakenly believing it was of the latter.

And argument subsequent to rulings is mere wrangling and intolerable. The only regret is that the occasion arose and that it would seem the Court's remarks were less dignified than is desirable. Any consequent prejudice, however, would be to the Court's esteem.

The Court further inclines to believe that a more or less mistaken conception of rights and duties influences counsel to imagine prejudice. An inkling of this is found in his superfluous insertion on page 14 of the bill that the Court interrupted a

witness of plaintiff's under cross-examination and without any previous objection by counsel for plaintiff, clearly a challenge of the Court's duty to confine evidence to the issues and an intimation that the exercise of this duty manifested bias for plaintiff and prejudice for defendant. So in his general exception at the conclusion of the evidence it would appear counsel inclined to the view that the Court's rulings ought to be somewhat evenly apportioned, for he founds a complaint of prejudicial demeanor rather on the quantity of adverse rulings than on their quality. So of his complaint in argument hereon, that the Court admonished his witness under cross-examination not to volunteer information, again a challenge of the Court's right to require witnesses to keep within legal bounds. So of his like complaint that when he was examining his own witness, coercingly and impeachingly as it seemed to the Court, the Court qualifiedly approved the witness' testimony. So at argument hereon, he complains in substance that at a former and abortive [7] trial of this action "the jury was with us from the beginning but in this trial it seemed against us all along," displaying no less satisfaction that the former and a partial jury gave defendant an unfair advantage, than resentment that the latter and as assumed like jury reversed the situation. Now it well may be that not observing in the latter jury any special favor for defendant, counsel, disappointed, concluded it was prejudiced against him, so prone are some to believe that those not for them are against them. The Court perceived nothing

and knows nothing impeaching the fairness and fidelity of the jury herein. The Court is of the opinion that upon the evidence a verdict for plaintiff is well warranted. As a matter of fact the history of this cause tends to the belief that counsel, most zealous for his client, as always, has nursed somewhat of a grievance in that the case did not terminate upon some objection or motion but went to trial and to a jury. These observations are not a pleasing task but are compelled, demanded by truth, and more to conserve the rights of plaintiff than by any solicitude personal to the presiding Judge.

In brief reference to some of counsel's contentions, that plaintiff remarried since the trial is not a ground for a new trial. It neither mitigates nor aggravates damages. There was no denial that the driver drank. Hence, his habits were not material. In view of all facts and circumstances of this case, such habits were incompetent to raise a presumption that on the occasion involved he had drank to excess, from which to presume he drove negligently, from which to presume his negligent driving contributed to the injury complained of—presumptions upon presumptions. There was no direct evidence the driver was negligent, contributing to the injury.

See 115 Fed. 275.

Thompson vs. Bowie, 4 Wall. 463. [8]

Depositions taken, either party is entitled to use all of them, direct and cross. On a trial, a party is not limited to the benefit accruing from his own witnesses and their direct examination, but may

avail himself of that of the opposing party's witnesses and of that party's cross-examination of the other's witnesses. Hence, neither party can withdraw any part of a deposition against the will of the other. The demand that the driver be produced, the attempt to introduce evidence of his contradictory statements without foundation laid as the state statutes require, the endeavor to impeach its own witnesses, and the like wherein rulings were against defendant, need nothing here.

In respect to excessive damages, the local law is that for wrongful death damages are such as under all the circumstances may be just. Though wholly pecuniary, not only cost of replacing services lost (and what is the cost of replacing a wife's bare labors with hired domestics—one or two or more—their wages, maintenance, lack of her economies, etc.) but society, companionship, affection, comfort and counsel of a wife may be considered to that end in an action by the injured husband. *Mize case*, 38 Mont. 535.

The amount must be left to turn mainly upon the sound sense and deliberate judgment of the jury. See *Ry. Co. vs. Barron*, 5 Wall. 106.

If, in an amount greater than the Judge might allow, not to be held excessive unless flagrantly so, creating a presumption due to passion or prejudice; for the Court is not to substitute its judgment for that of the jury.

Nilson's Case, 47 Mont. 416.

Even those who will not agree with Solomon that

the value of [9] a good wife is above rubies, will concede that in large part her husband's future and financial success depend upon her. And her loss late in life, after years of association, is virtually the end of his endeavor, is the end of the world for him. That in the past in like cases lesser amounts have been held excessive is not persuasive. All values have advanced. New precedents must arise. The Court is not able to say the jury's judgment was not honest and is not supported by the evidence. The motion for a new trial is denied.

BOURQUIN, J.

Jan., 1915.

Filed January 14, 1915. Geo. W. Sproule, Clerk.
[10]

*In the District Court of the United States for the
District of Montana.*

HERBERT L. ENNIS et al.,

Plaintiffs,

vs.

GREAT NORTHERN RAILWAY COMPANY
et al.,

Defendants.

**Plaintiffs' Amendments to Defendants' Proposed
Bill of Exceptions.**

Now come the plaintiffs above named and present for allowance the following amendments to defendants' proposed bill of exceptions in the above-entitled cause:

1. On page 20, line 27, of said proposed bill, be-

ginning with the words "Yes, sir," on said line, strike out the words "referred to" and the next succeeding words on said line; also all of the words on line 28 and the words "runaway" on line 29; the same being "Yes, sir, I did expect that the carcass would frighten the horses to such an extent that they would run away," and insert in lieu thereof the following:

"Q. You did not expect that the carcass would frighten the horses to such an extent that they would run away, did you? A. Yes, sir."

2. On page 20, line 31, begin a new paragraph with the words "No, sir," continuing the testimony thereafter as it appears on said page after the words "No, sir" last referred to.

3. On page 98, lines 8 to 27 inclusive of said proposed bill of exceptions, strike out all of the matter set forth.

R. O. LUNKE,
WALSH, NOLAN & SCALLON,
Attorneys for Plaintiffs.

Due personal service of within amendments made and admitted and receipt of copy acknowledged this 22d day of October, 1914.

VEAZEY & VEAZEY,
Attys. for Deft. G. N. Ry. Co.

Filed Oct. 23, 1914. Geo. W. Sproule, Clerk. [11]

**[Minutes, November 18, 1914, the Settlement of Bill
of Exceptions, etc.]**

*In the District Court of the United States in and for
the District of Montana.*

No. 960.

H. L. ENNIS et al.,

vs.

GREAT NORTHERN RY. CO. et al.

This cause came on regularly at this time for settlement of defendants' bill of exceptions and hearing on motion for new trial, I. Parker Veazey, Jr., Esq., appearing for the defendants, and C. B. Nolan, Esq., appearing for the plaintiffs.

Thereupon the bill of exceptions was duly settled, the same to be signed and allowed when properly engrossed and presented.

Thereupon motion for new trial was duly argued by counsel, submitted and taken under advisement by the Court.

Entered in open court, November 18th, 1914.

GEO. W. SPROULE,

Clerk. [12]

**[Certificate of Clerk U. S. District Court to
Supplemental Transcript of Record.]**

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Cir-

cuit, that the foregoing volume of 12 pages, is a full, true, correct and compared transcript of the original Praeceptum for Supplemental Transcript and of the two Opinions, Proposed Amendments to Bill of Exceptions, and Order of November 18, 1914, mentioned in said Praeceptum for Supplemental Transcript, now remaining on file and of record in my office as such clerk.

I further certify that the costs of this Supplemental Transcript amount to the sum of \$5.20, and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Helena, Montana, this 13th day of November, A. D. 1915.

[Seal]

GEO. W. SPROULE,

Clerk.

[Ten Cent Internal Revenue Stamp Canceled,
11/13/1915. G. W. S.]

[Endorsed]: No. 2598. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Plaintiff in Error, vs. Herbert L. Ennis and Guy W. Ennis, Defendants in Error. Supplemental Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed November 16, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

No. 2598

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH DISTRICT

GREAT NORTHERN RAILWAY
COMPANY,

Plaintiff in Error,

vs.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

VEAZEY &VEAZEY,
Attorneys for Plaintiff in Error

Filed October.....1915.

Filed

OCT 7 - 1915

Clerk.

F. D. Monahan,

Clerk.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH DISTRICT

GREAT NORTHERN RAILWAY
COMPANY,
Plaintiff in Error,
vs.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR

I

STATEMENT OF THE CASE.

This was an action brought by the plaintiffs, as the husband and son, respectively, of the deceased Nettie Ennis, to recover damages for her death, caused by the negligence of the defendant Railway Company. The son was thirty years of age and self-sustaining, living in Chicago away from his mother, who was forty-nine years of age and lived with her husband, one of the plaintiffs, who was fifty-nine years of age, on their homestead near Bainville, Montana (Tr. p. 61; 70-71). As in such an action the damages are limited to the pecuniary loss, clearly under this evidence the action is legally,

practically, brought only for the benefit of the husband, and hereafter, for convenience, the action will be so characterized, and he will be designated as the plaintiff.

(A)

GENERAL OUTLINE

In the original complaint it was alleged that the defendant Railway Company placed, and negligently permitted to remain, on a certain public highway crossing over its right of way near Bainville, Montana, the carcass of a horse, which was an object likely to frighten horses, and that thereafter the deceased wife was riding in a buggy attached to a team of horses being driven by John Bigelow, a horseman and driver employed on the ranch, and that the horses took fright at the carcass and ran away, throwing her out of the buggy and inflicting injuries from which she died (Tr. p. 26-29).

When a trial was had on this complaint, the plaintiff was unable to prove that the way in question was a public highway, and a variance was about to arise in the middle of the plaintiff's proof. Whereupon, the plaintiff, accepting and abiding by the ruling of the court, took a continuance in order to amend his complaint at his request "by striking from the complaint the allegation that the crossing was a public highway and by inserting in lieu thereof allegations showing that Nettie Ennis was using said crossing at the invitation of the defendant" (Tr. p. 293).

Thereupon plaintiff's amended complaint was filed and pleaded that defendant invited the deceased to use the roadway (Tr. p. 26). Defendant moved to strike portions of this complaint on the ground that the plaintiff still was alleging that the roadway was a public highway (Tr. p. 36-40), and in the argument thereof the plaintiff disclaimed any intention to claim that the roadway in question was a public highway (Tr. p. 40), and accordingly the court allowed said amended complaint to stand as alleging that the roadway "was a way by invitation, acquiescence or license" (Tr. p. 41-42).

A demurrer was then sustained to this complaint (Tr. p. 48-53), on the ground that no violation of duty was shown if the way was a mere invited way, and thereupon a second amended complaint, the one in question now, was filed, which returned to the old theory and alleged that the way in question was a public highway by estoppel and by dedication (Tr. p. 7-14). It was on this theory that the action was finally submitted to the jury—that on the basis of an invited way or way by license there would be no liability (Tr. p. 234), but plaintiff did not claim this, but claimed it was a public highway by estoppel (Tr. p. 218).

When this complaint was filed, thus returning to the old disproved, abandoned theory of the existence of a public highway, defendant again moved to strike portions thereof (Tr. p. 45-59), on the ground that it was now clear that plaintiff intended to assert that the roadway was

a public highway, and on the ground that the question as to whether the roadway was a public highway by being regularly laid out, by dedication, or by estoppel, or otherwise, was included in the allegation of the first complaint that the roadway was a public highway, and that at the previous hearing the plaintiff failed to prove this, and acquiesced in the court's ruling that he could not, under the then existing pleadings, recover, unless he could prove this, formally advised that he could not prove this way a public highway, and elected to abandon that allegation and to amend his complaint "by striking out the allegation" aforesaid, ^{and by} alleging that the roadway was one used by invitation or license. That, therefore, the question as to whether or not the way in question was a public highway was a matter which had been litigated between the parties, but the plaintiff thereafter, finding later that he had no cause of action on the theory of an invited way, was now seeking again to litigate the question of a public way, from which he was foreclosed by the privilege of amendment and continuance obtained at the previous hearing, upon his electing to abandon that trial and to abandon his allegation of a public way, as hereinbefore recited (Tr. p. 49-55), but the court denied the motion to strike and thus permitted the plaintiff to revert to his old theory that the way in question was a public highway, at any rate by estoppel (Tr. p. 59). This is the first error which we urge.

The action was thus one where damages were

sought by reason of defendant placing and negligently leaving a carcass near a highway which was likely to cause a runaway, all of which the defendant knew, or should have known, whereby a team did run away, *the driver thereof being "without knowledge that said carcass would cause said team to run away"* (Tr. p. 12).

Defendant pleaded a general denial and contributory negligence (Tr. p. 16-20) on general grounds, and also because, if defendant was negligent, the driver knew of this negligence and thrusting himself upon it, had the last clear chance to avoid this negligence, and the resulting accident, and hence defendant's negligence was not a cause, but a mere condition of the accident (Tr. p. 18-20).

This feature of non-liability (at least ~~is~~ a question of fact for the jury, because plaintiff's case illustrated the rule that one who has the last clear chance to avoid an accident is deemed the cause thereof, and that a person cannot recover who, present, has thrust himself on a condition created by the negligence of an absentee) is important, as it was one ground of the motion for a non-suit (Tr. p. 130-131), which was overruled (Tr. p. 131), and of the request for an instruction to return a verdict for defendant (Tr. p. 201).

Moreover, in this connection the court overruled defendant's objections to the court's instructions, on the ground that they did not cover this issue (Tr. p. 235), and the court refused instructions covering this issue (Tr. p. 203-207 Request-

ed instructions IIA to IIE), and held that it was not an issue in the case (Tr. p. 223-225). For convenience, we will call this the issue as to whether defendant's negligence was the cause of the accident.

These defenses were denied by plaintiff in his reply (Tr. p. 21-22) and a trial was had (Tr. p. 60-238) and a verdict returned (Tr. p. 23) for \$8000, on which judgment was entered (Tr. p. 24), and a writ of error (Tr. p. 266-267) was sued out to review this judgment and brings up for review the following errors:

(1) The error of the court in permitting plaintiff to amend his complaint so as to proceed on the basis that the road in question was not a mere invited way, but a public highway by estoppel. This error has already been outlined.

(2) The error of the court in overruling the demurrer to the complaint upon which the action was tried (Tr. p. 15) and in overruling the objection to the introduction of evidence, because the complaint did not state a cause of action (Tr. p. 61), and in overruling the motion for a non-suit, and in refusing a peremptory charge. All these proceedings will be argued under the heading which indicates the basis thereof, to-wit: No negligence shown.

(3) The refusal of the court to charge that under the proof, to the effect that the plaintiff and the driver had for some months known of defendant's negligence, if any, and might easily have avoided the same, such negligence was not

a cause of the accident, and the court's overruling the objections to the court's charge on the ground that it did not cover this issue. These errors will be urged under the heading, "Defendant's Negligence not a Legal Cause."

(4) Errors in evidence, such as (a) the ruling of the court denying the offers to prove that the driver was habitually given to the use of intoxicating liquor to excess, as affecting his contributory negligence (Tr. p. 79, 136, 139); (b) the refusal of the court to allow defendant to withdraw a question asked the driver at the last trial, as to whether he had ever said it was a piece of paper, and not the carcass, which frightened the team and caused the runaway (Tr. p. 93-95); (c) the court's later refusal of defendant's efforts to show that the driver had made such inconsistent declaration)Tr. p. 132-136; 143); (d) the court's permitting the driver's testimony at a previous trial to be read in evidence, without the absence of the witness having been sufficiently accounted for (Tr. p. 81-94); (e) the error of the court in permitting a witness, Mrs. Charles Allison, to testify for the plaintiff as to deceased having conversed after the accident as to the cause thereof and her not having said anything about the driver having had liquor (Tr. p. 102-103); (f) the error of the court in refusing to allow the rehabilitation of the witness John Lundquist on redirect examination (Tr. p. 185); and (g) many rulings made on the evidence in the course of the trial, too numerous to

assign separately, and the misconduct, we think, of the court throughout the trial which operated to the prejudice of the defendant, whereby also defendant's witnesses were confused, plaintiff's counsel compelled to make meaningless objections, defendant's counsel hampered in the examination of witnesses and defendant's defenses ridiculed before the jury—certainly repeatedly commented upon unfavorably and improperly—by the court, so that the verdict represents rather the temporary judgment of the court in the condition of the court's mind at the time, forced upon the jury, rather than any deliberate judgment of the jury.

This last assignment of error is set forth in detail in the specification numbered XII, and is set forth pursuant to an exception to the court's conduct taken at the end of the trial (Tr. p. 198). It will be necessary, of course, to outline the same in detail and therefore the brief may be somewhat prolonged, but we will undertake this task at this time.

(B)

MISCONDUCT OF THE COURT.

Let us bear in mind that this is a case where the horses were said to have taken fright by reason of the appearance and smell of the carcass. The answer, as stated, denied these issues, and pleaded contributory negligence in great detail, as required by the rules of pleading embodied in the local Montana decisions.

These being the issues, the plaintiff himself

had, by his testimony, sought to establish his case (Tr. p. 61 to 78), when defendant, in the cross-examination of the plaintiff, sought to bring out its defense of contributory negligence by showing that the driver was under the influence of intoxicating liquor. It was at this time that the court, *suddenly*, and without reason or excuse, lost control, and first started on its course of hostility to the defendant, and from the time of this sudden and abrupt beginning, defendant, even in its three respectful and earnest (Tr. p. 152, 158, 194, 198) pleadings with the court, was not thereafter able to restore the judicial equilibrium.

(A) *On Defense of Contributory Negligence.*

The cross-examination was continuing and there was no objection before the court. Suddenly the court interrupts the examination and asks if there is any plea of contributory negligence (Tr. p. 78). The court, in its opinion, censures us for calling attention to this action, remarking, in its opinion, that this constitutes a clear challenge of its right on its own motion, to confine the **evidence to the issues.**

We are, however, emphasizing this matter by reason of the fact that this action by the court, which we mean respectfully to designate as an interruption, constitutes the beginning of the later trouble, and should be scrutinized from that point of view. Let us bear in mind also that the answer definitely states that it sets forth two separate defenses, each separately

stated and conspicuously numbered. Also the averments of the answer embrace less than four pages (Tr. p 16 to 20) and two of these are taken up with a narrative of the ultimate facts showing contributory negligence (Tr. 18 to 20). A moment's glance would, therefore, have shown that negligence was pleaded in detail.

The question asked by the court (Tr. p. 78) also was not whether the specific fact of intoxication was pleaded—pleading evidence—but whether there was any plea of contributory negligence at all.

Again, on being advised that there was such a plea, and although a moment's glance at the answer would show that this plea embraced almost the greater part thereof, the court hypothetically declined to recognize that there is any such issue, and says that *evidence as to any intoxication of the driver is not "worth while going into,"* but on counsel again advising that there is such an issue, the court recedes (Tr. p. 78-79). Little progress was, however, made, when an objection was made that defendant's questions as to the driver being under the influence of liquor were directed to a time too remote to show intoxication at the time of the accident, and that the proof should be confined to evidence of his incapacity at the time of the accident. The court thereupon, in effect, overrules the objection as made but returns to his former position, and excludes the evidence on a ground which counsel for plaintiffs did not have the temerity to advance, and rules that

there was *no issue of contributory negligence* “as the court sees it.” (Tr. p. 79-80).

We dwell upon this, as stated, because it marks the sudden beginning of the trouble which then developed. The cold reading of the transcript shows perhaps merely a ruling by the court on a matter of law, and the manner of the court, of course, cannot be reproduced in print, and is, therefore, lost to us, but we emphasize that the interjection was made by the court of its own motion, its ruling that contributory negligence was not an issue was erroneous, and the plaintiffs were not themselves supporting the court or agreeing with the court in this matter, or denying the validity of the defendant's assertions that the matter was in issue.

Defendant thus had difficulty in getting this proof as to the condition of the driver into the case, but it appears that the plaintiff had no such difficulty, for, after voluntarily attempting to confine the plaintiff's proof to what the court considered were the issues, and after having ruled, without objection by the plaintiff, that there was no issue of contributory negligence, or of intoxication, we find that the plaintiff, without any interruption by the court, is allowed, through the witness, Mrs. Charles Allison (Tr. p. 100), to testify that Bigelow, at the time of the accident, “was perfectly sober.” She was cross-examined on this (Tr. p. 101). Again, Mrs. Katy Meinhardt was allowed to testify for the plaintiff that

Bigelow "was perfectly sober," and that "there was no sign that he had been drinking at all" (Tr. p. 109-110), and she also was cross-examined on this (Tr. p. 111).

Summarizing the plaintiff's case, therefore, it seems that the defendant's efforts to consider this proper issue were met by voluntary interruptions by the court, not sustained by the plaintiff, excluding the proof, but when the *plaintiff thereafter made the issue of intoxication an issue* in the case, there was *no objection by the court*. This is particularly important in the light of the court thereafter, in defendant's case, as will be shown, still prohibiting defendant from making this proof.

Defendant, really to meet plaintiff's own proof, afterward, in its own case, sought to establish the driver's condition at the time of the accident, by proof of settled habits and a question on this point was objected to by plaintiffs on general grounds. The court sustained the objection and directed defendant to "Write your offer of proof if you think it will do you any good," thus before the jury (in the light of the fact that the court later changed its mind and admitted part of the testimony) stating in effect that defendant was trying to introduce improper proof, and that whatever proof might be introduced on this matter would not, in the opinion of the court, "do any good." (Tr. p. 136). It is reasonable and probable, in the light of the court's entire conduct, that the jury understood the remark of the court as a reflection upon the

defendant's proof. The court then adds: "We will give you time. *It is not admissible under the issues in this case*"; thus again repeating its ruling that there was no issue of contributory negligence (Tr. p. 136 to 137), although, let us emphasize again, a moment's impartial glance at the answer would have convinced the court of its error and plaintiff had still in these three instances, refused to join in the court's error, and the whole matter had already been made an issue by plaintiff's proof.

On the offer of proof being made the plaintiff objects to the same on the ground that habit is too remote, and finally, and apparently more under compulsion induced by the court's demeanor, reluctantly includes the court's objection that the evidence was not admissible under the issues, which objection the court sustained (Tr. p. 136 to 137).

Again, by another written offer in the examination of another witness, these facts were sought to be elicited by defendant on this matter of the condition of the driver, which offer was also denied (Tr. p. 139 to 140), and finally defendant sought to prove the driver's condition in the Town of Bainville at the time he started to drive back to the ranch only four miles away, and perhaps not more than one-half an hour before the accident. Here again, even before any question directly involving this matter was before the court, and again without any objection of that nature being made by the plaintiffs and although the court had allowed the plaintiff

to cover this fully in his own case, the court, by way of anticipation, rules that the defendant could not show, as a part of its case, the condition of the driver, even that near to the time of the accident.

The witness was asked: "Did you see yourself where he (the driver) went during the morning in question just before returning to the ranch?" He answers: "Well, I was naturally meeting him around my place." Counsel's objection then only went to the word "naturally," but the court says: "Of course the purpose of this is to show the condition of the man at the time he left town. It would not be admissible to show that. That would not be allowable as a part of the case of the defendant."

As stated, the question actually propounded at that time did not directly involve the matter ruled upon by the court, and accordingly, lest the court's ruling be deemed hypothetical, and as a step necessary in the preservation of the plain error thus involved in the mere anticipatory ruling of the court, the defendant asks the witness directly:

"What was his (the driver's) condition at that time (just before starting for the scene where the accident occurred) relative to sobriety or intoxication?"

Plaintiffs' counsel, now entirely under the moral compulsion of the court, induced by the court's repeated refusal to recognize validity in objections actually made by the plaintiffs, and its repeated reiteration, without such objections

being made by the plaintiffs, that such evidence was not an issue, again is compelled to adopt the court's view, and now again urges that the condition of the driver was "entirely" independent of any issue in the case. Though the issues raised in the answer are then clearly outlined to the court by the defendant, the court sustains the objection thus forced upon the plaintiffs and rules "There is no issue as to the intoxication of the driver" (Tr. p. 141).

An offer of proof would, therefore, be necessary in order to present this error, and, in a proper effort at the same time to withhold from the jury the nature of the excluded proof, thus no longer proper for them to consider, defendant requested an adjournment in order to write out certain offers of proof, and, as considerable time would elapse in writing out the offers, an adjournment was taken near the noon hour to enable the defendant to write out its offers on this and other matters (Tr. p. 141 to 142).

Upon court reconvening, though the court had three times ruled, by way of anticipation, that the evidence was not admissible, and though the court had compelled, as we think, plaintiffs' counsel finally to contend that the evidence was "entirely" beside the issue, plaintiffs' counsel is unable longer to have the temerity to follow the court in this plain error and accordingly withdraws the objection and concedes the plain admissibility of the testimony.

The court also, now taking the same view and realizing the extent of its error, attempts to

correct this error on the law and rules that evidence is admissible as to the condition of the driver on the morning of the accident. However, this change in the court's attitude was not, perhaps unnecessarily, accompanied by any frank admission or recognition of the validity of defendant's rights, with the intention of thereby removing any improper impression gained by the jury, but, on the contrary, in defining its changed attitude and its ruling that defendant's questions relating to the condition of the driver at the time were proper, did so in a manner which we think led the jury to believe that the evidence was admitted, not as of right, to the defendant, but rather by the grace of the court, a condition in the court's attitude which from this time on marked the reception of all of the defendant's evidence.

The court said: "*If you have anything in relation to that at all you may proceed,*" from which remark the jury may have understood that the court meant to indicate, we think, a sort of anticipatory lack of credence in any testimony along these lines, and the court's action seemed to carry the possibility of it conveying a warning to the witness not to incur the court's displeasure in any testimony which the witness might be about to give on a matter which the court had thus for so long forbidden defendant from rebutting (Tr. p. 142 to 143).

Plaintiff was also alive to the impression being created before the jury by the court's attitude even in correcting its own error, and remarks

that the defendant (by its efforts, finally successful, to avoid a glaring error in the record) has been "harassing" the court, and the court, far from stating that defendant's conduct has been apparently to the advantage of the court and all concerned, rather, we think, applauds plaintiff's view (Tr. p. 142 to 143), and disclaims any knowledge of any effort having yet been made on the part of the defendant to show the condition of the driver at that time, although the last question was expressly asked on this matter and the adjournment was expressly taken to enable the defendant, by an offer of proof, to preserve this error. (Tr. p. 143.)

Defendant thereupon, after disposing of its offers on other matters, proceeds to inquire of the witness as to the condition of the driver at the time in question (Tr. p. 144 to 145). Two things are operating on the witness: First, the court's unfriendly attitude to this proof would discourage any witness from thus running counter to the court, and secondly, an interview by one of the plaintiffs as a neighbor and friend during the noon recess (Tr. p. 148 to 149).

Accordingly, after the adjournment the witness says first: "I cannot tell you exactly what condition he was in." He is clearly reluctant. He is seeking to evade an unpleasant duty. In defendant's silence, he adds: "He was in my place of business." Asked by the defendant to go ahead and state all the facts bearing on his condition he says: "Well, I should judge that I knew that Jack was taking a drink or two.

I know that. I saw him take a drink or two. That is all I can state. He took one or two with me." The reluctance of the witness to testify having been shown, the defendant is forced to weaken the anticipated testimony by edging nearer to the subject and witness says: "He was not drunk. What I mean by drunk is that he was not staggering around." He continues slightly to resist examination by talking generally, without exactly describing his condition. He hesitates and defendant reluctantly suggests that the witness should not hesitate to tell whatever he knows, and thereupon the witness, still averse to giving a conclusion, narrates the saloons he and the driver visited (Tr. p. 145-146).

Not having yet been willing to testify directly in response to the questions propounded or as to the condition of the driver, the witness is then asked to describe the driver's condition in the language of the street, and the court sustains an objection that the language of the street is "incompetent," and although plaintiffs' counsel, appreciating the difficulty of getting facts from a reluctant witness, saw no ground of objection because defendant was now reluctantly being compelled to venture towards, but carefully keeping off of, the ground of leading questions, the court again ignores the objection as made and remarks: "This man has been liquor dealing and has seen men drunk. He can tell whether a man is under the influence of liquor or drunk *without being urged strongly.*" (Tr.

p. 145 to 146). Finally the witness answers, "Well, as near as I can describe it, I would put it this way. He was not drunk, but feeling good. That is about as close as I can come to it."

In its last effort, now necessarily direct, defendant asks whether the witness had not, out of court, described the driver's condition as "just short of a good start for a spree," and the witness pertinently replies, in describing his condition, "Well, if he was feeling good, I suppose if he had stayed there, why naturally he would have wound up in a spree." Thereupon the court again without any motion to strike, or other matter being before it for ruling, remarks critically: "You will have to explain to the jury where the man started from (Tr. p. 146 to 147).

The witness not having directly answered the question, it is repeated ("Was that the expression you used to me that he was just short of a good start for a spree?"), and the question, as a question to refresh a witness' recollection, is objected to "as immaterial," on the ground that the plaintiffs "were not there to keep track of the witness," and the court sustains the objection. An offer of proof is necessarily made accordingly and the court rules, according to the bill of exceptions as prepared from the stenographer's notes and settled and signed by the court: "*I don't see that it would enlighten the jury any if he did see him drunk.*" This is later corrected by the court after the settlement of the bill (Tr. p. 147) so as to strike out the

word "drunk" and substitute the words "at that stage." In any event the comment was, we think, improper.

The cross-examination of the witness then revealed one apparent cause of his reluctance, in addition to his fear of incurring the court's hostility, for the transcript shows that during the recess, he had been interviewed by one of the plaintiffs.

In his cross-examination he was confused by ~~the~~ two questions being propounded to him at the same time for purposes of impeachment, one of which was an erroneous narrative of his testimony (Tr. p. 148). His attempted answer to one of these questions thus propounded at the same time was directly responsive, yet he was censured by plaintiffs' counsel for not responding, and defendant's effort to protect him in his rights does not meet with any approval from the court (Tr. p. 148). Out of the confusion finally emerges a statement by witness that during the recess he had told the plaintiff that, as to whether the driver was drunk or sober, he was not positive, and that it was so long ago that it was pretty hard for him to recollect the condition the driver was in, but witness knew that the man had some drinks (Tr. p. 148 to 149).

In his cross-examination the witness was frank though the examination was severe and the questions confusing. Defendant's counsel, not being sure of the scope of the answers and gathering that from the cross-examination, there

might be some inconsistency, sought, on redirect, to review the witness's cross-examination, and give him an opportunity to make any explanation of any inconsistency if he desired. On objection being made counsel advised the court that the question was propounded in part in order to clear up a confusion or misunderstanding in the mind of defendant's counsel as to the meaning of the cross-examination, but the court declined to permit it, remarking "I don't think the jury is in any doubt about it" (Tr. p. 151 to 153).

Counsel offered also to get from the witness any explanation as to any possible inconsistency in his testimony, but the court declined to allow it, thus leaving the jury, perhaps sharing counsel's confusion, since the cross-examination in the record shows that there was no real or substantial conflict. If the witness had, however, stated on redirect that he recognized no inconsistency, that what he meant at all times was that he was not positive exactly as to whether the man was drunk or on the border line, but that he did know that the man was feeling good, or words to that effect, the confusion might have been clarified. This might have been the testimony of the witness, but the court would not permit "rehabilitation on redirect examination," or explanation to be elicited by even the most indirect questions.

Thus it was that throughout the trial on the issue as to the intoxication or impaired condition of the driver's mental faculties, the defendant

was repeatedly hampered by the court's action, sometimes involving positive errors, never corrected, sometimes involving errors which the court corrected in, we think, an entirely ungracious manner, leaving an impression with the jury that defendant's evidence was admitted almost entirely by the grace of the court, sometimes involving matters of form resting in the discretion of the court, with the discretion always unnecessarily exercised adverse to the defendant. The court's manner was, we think, always hostile and severe, hampering counsel and discouraging the witnesses. Many of the court's rulings were on the border line of discretion and error: possibly today only a few instances are sufficiently serious to constitute reversible error as a single ruling, but certainly as a result of the combination thereof the jury were undoubtedly prejudiced against this phase of defendant's case.

But, not content with these remarks in the course of the trial, as to the driver's condition, the court, in its charge, commented on this phase of the case as follows:

"In reference to that (the contributory negligence of the driver) all the court has heard in the way of evidence is that Bigelow had been drinking that day. A drink or two seems to be all the direct evidence. Possibly you would say one drink is all that is actually proven, but it is for you to say because the witness Hubener was defendant's witness and if he is in doubt you have the right to take the most favorable view of the evidence for the plaintiffs. There is other evidence that witnesses smelled liquor on

Bigelow's breath; one saw a bottle in his pocket. It would be a fair inference that it was a bottle of liquor of some kind. There is not much evidence from which you might infer negligence on the part of Bigelow; at the same time the court will leave it to you to say."

"In my opinion the evidence of contributory negligence would be very slight, but you are not bound by that opinion. You have the right to infer it from the fact that Bigelow had some drinks, but *I imagine most men take a drink or two occasionally.*" Tr. p. 223 to 224).

The court thus says that the evidence of Bigelow's being at all under the influence of liquor was slight, yet the witness Hubener, though a friend of the plaintiff himself, with the Hubener and Ennis families intimate, says that Bigelow was feeling good when he left town, and the witness Torqueson, a disinterested witness, who was present at the scene of the runaway, says he smelled liquor on the driver's breath (Tr. p. 166 to 167), and John Lundquist, a banker, lumberman, general country merchant and rancher of that community, noticed a bottle in the driver's inside vest pocket, immediately after the accident (P. 179). And the whole subject of intoxication was of sufficient importance to justify the court at the very close of the plaintiff's case, again of its own motion, to ask the plaintiff, on a subject not discussed by the plaintiff in re-opening his case, whether, an hour and a half after the accident, when the witness first saw the driver, the driver was then under the influence of liquor (P. 197).

And finally, in its opinion, on the petition for

a new trial, the court completely reverses itself and says that "there was no denial that the driver drank." It will be noticed, however, that in the case as presented to the jury, plaintiff's witnesses denied that there were any signs that he had been drinking and the driver himself testified in his testimony, read in evidence, that he had not been drinking any that day (Tr. p. 93).

Lastly, though the driver, charged with the responsibility of having the safety of the wife of his employer entrusted to his care, in the management of his horses so far violates that trust as to drink intoxicating liquor while on duty, this conduct, repeatedly the subject of adverse comment in any suit involving negligence in the handling of horses, is (unless we are stating the matter unfairly or too critically) *glossed over by the court on behalf of the plaintiffs* with the statement that "everyone takes a drink or two," an attitude, we believe, which tended to minimize the driver's fault.

(B) *The Carcass Did Not Cause the Runaway.*

The second defense related to the carcass as an object likely to frighten horses by reason of the odor said to be given forth by it, or by reason of its position. The plaintiff seemed to take the position that it was the odor from the carcass that seemed to make the trouble (P. 68 to 69, p. 74 and 84). The plaintiffs' witnesses had testified that on several occasions they had passed by and their horses had been

frightened to some extent. Defendant was endeavoring to show the contrary.

For this purpose the witness Provost was called. The transcript shows (Tr. p. 161 to 162) the extent that he was worried by the court's prior demeanor. Uncertainly, after having testified that he used the crossing, he testified that he could not recall any particular use he had made of the crossing near where the accident happened at the time of the accident. To refresh his recollection and to remind him of his statements out of court that at the time he was seeding a tract of land near the crossing, which necessitated his using the crossing daily with horses at that time, he was asked whether there was any reason why he would cross at that time, more than at any other time. This is objected to as "*immaterial*" and *the objection is sustained*. (Tr. p. 155). The court's rulings are unfriendly and generally adverse. At any rate the objections and rulings are so numerous as to impede progress. Defendant tries to get the facts without reminding the witness, each question being objected to, and finally the question is asked as to what time seeding would take place there, but the entire effort, either most indirectly or directly, to refresh the recollection of the witness is subjected to a running fire of objections sustained by the court, though it is inconceivable that any of them were well taken.

As an example of the extent to which this criticism is justified by the transcript, we note the following:

“Q. Is there anything, Mr. Provost, that would refresh your recollection and enable you to testify as to any use of that crossing from April 1st to the 18th?”

Objection: “We object to that as *leading and suggestive.*”

“*Objection sustained.*” Tr. p. 156.)

Let us bear in mind that this witness is shown by the transcript to have been affected by the court’s attitude to such an extent that on cross-examination, when asked whether he was not a “standing witness” for the Railway Company, dazed, he answered “Yes,” though proof showed that he had never been a witness except in a single instance, at which time he was an eye-witness (Tr. p. 161 to 162). The witness knew the Ennis horses and was asked to describe the skill necessary to handle them, but this was *objected to as “incompetent, irrelevant and immaterial,” and the objection was sustained.* The driver Bigelow had testified by deposition that the horses were as gentle as kittens, and to bring out the antithesis the witness was asked whether “you could say that those horses could be described as kittens,” but on objection that this was not “competent or material,” the court rules adversely and on an offer of proof being made, the court rules ambiguously and impatiently that this is not competent, but that the witness might describe what he knows of the horses (Tr. p. 157 to 158). The witness is then asked whether he would call the animals bronchos, and this question is objected to as leading. The transcript shows

that something had happened which made the witness's answers short and confusing, and that counsel for defendant was surprised and was leading only because necessary and partly to advise the court of the anticipated proof, in order that the court would admit the same. When the court, however, sustains the objection on the ground that the question was leading, a most reprehensible habit, counsel endeavors to excuse this action on the ground that the leading of the witness has been necessary, but the court rules that no argument is wanted. The court having thus ruled in the presence of the jury that the defendant was guilty of reprehensible conduct in asking a leading question, counsel is about to apologize for this seeming misconduct and to assure the court that the leading question was propounded in good faith, but the court, not permitting this, interjects, without, we think, any justification, a severe reprimand in the presence of the jury for thus merely endeavoring to explain to the court that the propounding of a leading question was not intentional misconduct and was undertaken only because deemed proper and necessary by counsel in order to elicit any testimony from the witness (Tr. p. 158). That the reprimand thus administered in the presence of the jury was unnecessary is perhaps illustrated by counsel's immediate apology to the court (Tr. p. 159), necessarily accompanied, however, by a respectful request for an exception to the court's remark.

The court then sustains every objection to any question to refresh the recollection of the witness, or meet the surprise of counsel. The witness is asked:

“Did you describe those horses as rather wild and hard to handle?” To avoid incurring displeasure at the hands of the court the question is in fact broken up by ^u sounding of the court’s view as to its propriety. Such a question is objected to as “hearsay, leading and immaterial,” though the conduct of the driver in handling the horses was directly in issue. The court nevertheless sustains the objection, but says that in the event surprise is claimed, or if it is desired to refresh the recollection of the witness, the testimony is admissible; otherwise not (Tr. p. 159). Unable to understand the ruling in that the objection was sustained counsel makes an offer accompanied by an acceptance of the court’s view that leading was necessary to refresh the recollection, and by reason of surprise, and then the court reverses itself and again sustains an objection that the offer was “immaterial and irrelevant” (Tr. p. 160). Defendant then gave up further examination.

On the same subject the witness John Lundquist; who was a merchant, banker and rancher, drove to the scene of the accident over the very crossing in question as soon as the accident occurred. He testified that the carcass did not bother his horse and was not in a condition to bother horses. He is severely cross-examined, and he endeavors to answer as a layman

would answer. He is asked whether there was any decomposition in the flesh at all. He answers "there was not as bad decomposition as there would be if the flesh had rested there in the warm weather of summer." The answer was directly responsive. Counsel improperly reprimands him, with no disapproval of the court, on the ground that this responsive answer was not responsive. "I don't care how it would be; I am asking was there any at all." The witness answers, "I never noticed any." Still not content with the examination counsel asks again, "You would not say there was or was not?" (Tr. p. 180-181).

The witness has answered every question, and, pressed on by another question, endeavors as a layman will to ascertain what is intended and to cover the same. He answers, as a conclusive effort to express his views, "No, I would not. I know there was nothing said about any smell that day." The answer in the first three words was directly responsive and the last represented merely a layman's effort to grasp the situation and meet it, and yet counsel rebukes the witness and asks him to answer the question, though the witness has done so, and the court, *without protecting the witness to the extent that he had answered the question*, sustains plaintiffs throughout, and *reprimands the witness*.

"Yes, don't volunteer any information."

Note that the court does not call attention to the fact that the objection as made was not well

taken, but that a motion to strike out part of the answer might be sustained on the ground that the witness had answered the question and then had added more, which the court would chose to declare volunteered. The court's ruling is entirely in favor of the plaintiff and against the witness and is accompanied by a sharp rebuke for mere unintentional, natural, technical misconduct of a layman as a witness (Tr. p. 181). The effect on the jury could not have been but adverse.

Lastly, on this subject, the defendant called its section foreman, who would have occasion to go over his section daily from Bainville easterly to and beyond the crossing. The defendant desirous of showing the duties of the foreman and his opportunity for observing the condition of the carcass and the fact that it could not give out odor or scare horses, sought to have the foreman describe the very limited length of his railroad section and therefore his increased opportunities to be familiar with the crossing in question, but without objection being made, the court curtails the examination and *rules as a matter of fact that the foreman's duties would cover too much ground to enable him to testify on the matter at issue*—the very fact which the defendant wished to disprove, and adds in substance that the defendant must content itself with a mere statement from the witness as to whether or not the carcass gave forth any odor, and that the defendant could not show in its own case that the opportunities of the witness

for observation were good. That this could be done only by the plaintiff "if the plaintiff wants to examine him." Says the court:

"You needn't go into details. If the plaintiff wants to examine him he can. All his duties would cover too much ground for this particular purpose" (Tr. p. 190 to 191).

The effect of this ruling was that the defendant was not allowed to show the duties of the section foreman bearing on his opportunities to observe, but as to such important matters to the defendant, the defendant would have to run the chance of the plaintiffs cross-examining or not cross-examining the witness, and the court practically left the defendant high and dry in this proof by stating in the presence of the jury that the section foreman's duties would cover too much ground to make his testimony of any avail, a fact which we were endeavoring to disprove, and particularly hinting to the plaintiff the lack of any necessity for cross-examination on this matter.

Counsel, startled at *a ruling that a witness may not supplement his direct testimony by proof of his opportunity for observation*, and fearing that he misunderstands the court, asks the witness to describe his duties as section foreman, and, on objection being made, explains the purpose of showing opportunity to observe, but the court, harsh and severe, reiterates its rulings and says: \

"Never mind; bring it right down to the cross-ing, and if the transaction is not specified with

sufficient particularity that can be brought out on cross-examination. Prove what he knows about the conditions at this crossing" (Tr. p. 191).

Seeking to conform to this ruling, whatever it meant (are we exaggerating or discourteous if we call it a mere angry ruling?) counsel asks:

"Do you recall any fact which would show your ability to observe whether or not there was any odor from that carcass?"

Objection: "We object to that as being incompetent, immaterial, irrelevant and *leading and suggestive*."

Frankly, but with entire respect to the district judge, we must state that the fact is that the court was temporarily beside itself in its opposition to defendant's case, and these meaningless objections were not made by the plaintiff willingly, but only because the court is insisting upon some support in its actions. The court meets this effort to conform to its ruling by adverse comment: "You have asked him in infinite detail now" (the transcript shows a page and a half of direct examination) and the court seemingly reflects upon the witness's testimony by adding: "He has said there was no odor; now I think that serves your purpose," a remark which we think approaches dangerously near being misunderstood by the jury as a severe reflection and criticism on the testimony of the witness and not as a ruling on a matter of law (Tr. p. 192).

The defendant next desired to show by the

witness that a very few days before the accident he and his crew stopped right at the crossing and spent an hour there, eating dinner within a few feet of the carcass, and no odor was noticed, though manifestly a person would not eat dinner in a locality such as this was claimed by the plaintiff to be. Defendant's efforts to get this testimony were met by objections of no merit, on which the court ruled ambiguously and harshly. Finally the testimony was admitted but only after the court had rebuked defendant's witness, harassed defendant's counsel in sustaining captious objections and in making rulings impossible to be understood, which also the court refused to explain, and finally ridiculing the proof and admitting it, saying that the testimony was not of the slightest importance.

Thus the witness testified that he stopped on the crossing shortly before the accident. In the light of the fact that a most general question has been objected to as leading and the objection sustained, defendant now asks:

"What did you stop there for?"

This is immediately objected to as "immaterial," and the court sustains the objection. Desperate, the defendant offered to prove that the witness and his crew in the week before the accident stopped on the crossing within a few feet of the carcass and noticed no odor. The court ruled ambiguously: "You can ask why he stopped there (the very question last propounded); ask him how long he stopped there" (Tr. p. 192.) Counsel, unable to understand the

ruling, inquired hesitatingly whether the offer was denied, and is met by an eager "Oh, yes," when the record shows that in fact the offer was not denied.

Counsel for plaintiff, fearing the record, but hesitating to withdraw all objection, lest the court's displeasure be incurred, stated: "I have no objection to his showing that he was there a week before and that he crossed there." The court then adds in impatience: "The court has indicated that he may do so. There is a limit to these matters of detail." (The examination has lasted for only a page and a half of the transcript excluding objections.)

Counsel then asks, in line with plaintiffs' permission, how long the witness stopped on the crossing on the occasion referred to, and the witness, instead of answering by a specification of the precise number of minutes, describes the length of the stop by a reference to an event, and says he stopped there during the dinner hour—"I and my crew eating dinner there." The answer, though not specifying the minutes or seconds, is entirely responsive as indicating the length of the stop, but the court, without any objection, *rebukes the witness* "You are asked how long you stopped there at that time," and the witness answers: "An hour" (Tr. p. 193).

Defendant next desired to show that the witness as foreman, in looking for gravel, had occasion to use a horse, riding around the country, and daily, sometime prior to the accident, rode over this crossing in going and

returning in his work in looking for gravel. Accordingly he was asked: "When you would look for gravel, what conveyance did you use?" This is immediately objected to as "immaterial." The materiality would not appear directly from the question, for the reason that the question was very general, but this form was apparently necessary, since the most indirect and general questions had been repeatedly objected to as leading and the court had sustained the objections. Counsel for defendant did not even dare to more than scarcely approach the subject in hand, and, worn out by the course of the trial, appeals respectfully to the court: "Will your Honor trust me in this particular this time?" but the court only scolds and comments harshly and improperly on the witness's former testimony, and handles questions of fact for the jury as decisions of law to be made by the court as to the weight of the evidence:

"The trouble is you make too hard work, your examination; too much detail. This matter of his traveling and *stopping there for dinner is not of consequence*. It was enough for him to stop there that long, without stopping there for the purpose of eating his dinner" (Tr. p. 194).

Finally the witness is permitted to testify that he searched for gravel on horseback, and in doing the work, daily rode over the crossing and his horse was not bothered by the carcass.

A last, but minor matter, is found at the end of the court's instructions where defendant necessarily in the presence of the jury, objects

to the instructions on the ground that they did not cover the fact that the driver knew of the conditions, whatever they were, at the crossing, and would therefore owe a duty to avoid any negligence of defendant, but the court, whose only function, we think, in its view, was to overrule the objection, remarks to counsel in the presence of the jury: "By placing the carcass there you cannot foreclose him from using that road."

(C) *Miscellaneous Matters.*

In the third place, there were a great many miscellaneous instances, not particularly important in themselves, but merely illustrating the course of conduct of the court throughout the trial. They serve to explain and give character to the above more serious action, and to show that, though only a few of them involved positive error, possibly only three were technically reversible error, the court's discretion was always exercised against the defendant, where propriety and a desire, not unduly to hamper or embarrass counsel, would have prompted rulings in favor of defendant, but the rulings of the court in the presence of the jury were harsh and accompanied by improper comment. Indeed, it was the court's action, we think, which so often forced upon the plaintiff the necessity of making objections.

As an example of one of these miscellaneous rulings, we will refer the court to the proceedings regarding the testimony of the driver Bige-

low. He had testified at a previous hearing and was not called as a witness at the instant trial. Accordingly plaintiff sought to introduce in evidence, by way of a deposition, his testimony at the former hearing (Tr. p. 81). It appeared that at the former hearing the defendant, not having impeaching testimony, was forced to sound the witness by cross-examination, to see whether he would concede that any impeaching testimony existed. He was accordingly asked whether he had ever made inconsistent statements to the effect that it was a piece of paper, and not the carcass, which caused the runaway. Plaintiff objected, at the former hearing, on the ground that the question was not a proper impeaching question, but on our disclaiming laying the foundation for impeachment, the court overruled this objection, and the witness denied that he had ever made any such inconsistent statement (Tr. p. 93).

In the light of this history of the former hearing, defendant at this trial affirmed that the witness Bigelow should be called, because his absence had not been sufficiently accounted for, and because defendant now had impeaching testimony, which theretofore it could only guess at, and defendant advised the court that it desired to withdraw said disclaimer and withdraw those questions, unless the court would permit impeachment, but the court not only ruled that in the absence of a proper impeaching question (which, in view of the absence of the witness, and the change in the conditions, could not now,

and could not at the former trial, have been propounded), impeachment would not be allowable, but also that, though conditions had changed, so that defendant no longer desired to sound the witness on cross-examination for impeaching testimony, the question and answer thus sought to be withdrawn by defendant, in the light of the changed conditions, could not be withdrawn. The court accordingly, as a part of the cross-examination, permitted the witness (over defendants' objection and withdrawal) to testify that he had always told the same consistent story.

Manifestly, in the light of the above history, the defendant was entitled to withdraw the question and could not have the question forced upon it at the trial with the changed conditions.

Again, if it was to be admitted at plaintiffs' instance, over defendants' objection, it would constitute, not cross-examination, but substantive testimony introduced by the plaintiffs at the plaintiffs' instance, and defendant was entitled to rebut the same, but the court also declined to permit the same to be rebutted (Tr. p. 94). In spite, therefore, of the changed conditions, *the court forced upon the defendant a question*, improper under the changed conditions, declined to permit defendant to withdraw the same, and after the same was read favorably to plaintiff, and at the plaintiffs' instance, forbade defendant from contradicting the same (Tr. p. 132 to 135; p. 143 to 144; p. 163).

The presentation of this matter at the trial

,and the outlining to the court of the above history of the case in the course of the proceedings necessarily consumed a little time, and the court, in finally ruling that plaintiff was entitled to force the question upon the defendant, said, in regard to defendant's request to withdraw the question:

"The court will not permit it. *Now we will hear what the witness has to say* and bring that (the contradiction thereof) up later" (Tr. p. 95);

thus indicating, we think, to the jury that as the result of the court's ruling, defendant had been thwarted in an effort to exclude competent testimony, but through the court's efforts "now," at last, "we will hear what the witness has to say," which defendant has so carefully endeavored to withhold. Later, when defendant sought to avail of the court's ruling, that the question of the right to rebut this testimony would be taken up when in its own case, defendant might seek to introduce such evidence, defendant, in offering proof as to inconsistent declarations by Bigelow, thus at the invitation of the court, renewed its contention that Bigelow's absence had not been sufficiently accounted for, and again called the court's attention to the fact that the above testimony had been forced into the case by the court not permitting the defendant to withdraw the question. The court's remarks, made in the presence of the jury, indicate some lack of faith in the sincerity of counsel's position, and now contain a direct hint as to what

should be the jury's final action in regard to defendant's defenses.

Says the court:

"You disclaimed any intention to impeach Bigelow when you put to him a question which was not a proper impeaching question. You expressly said it was not for the purpose of impeachment. It is your misfortune that you did not have the impeaching testimony at the time Bigelow testified. It is not the fault of the other side. Even the best cases" (to say nothing of the case of the defendant in this instance) *"are sometimes lost because testimony cannot be produced"* (Tr. p. 133 to 134).

It seems to us that the above ruling of the court constituted actual error. Clearly defendant was within its rights at the first hearing, and, not having impeaching testimony, and in the light of the driver's testimony in regard to the piece of paper (Tr. p. 85, 89, 91 and 92), to sound the witness on cross-examination to see whether the witness would state to the jury instances, if any, where he had made inconsistent statements. This is not impeachment, but is sounding the witness on cross-examination for facts which almost he alone may know, and no foundation is here necessary: (State v. Burrell, 27 Mont. 282, 70 Pac. 982).

But when, at the next trial, the defendant had impeaching testimony it was entitled, nay, it was its duty, to advise that the disclaimer was no longer true, and therefore it was entitled, nay, it was practically its duty, to withdraw the question.

Again, when the court rules that the question

and answer can thus be forced into the case, this should be at most as testimony introduced by the plaintiff and not as a part of the cross-examination, and in that event the plaintiff making it an issue and competent evidence, the defense was entitled to rebut it.

In this connection we would call the court's attention to the remarks of the court in its written opinion, where *the court says* that in the course of the trial defendant *made repeated demands that the plaintiff perform a miracle* of instantly producing the witness, who was not in the state. The transcript shows that Bigelow's absence was accounted for by the plaintiff merely by the fact that at the time of the trial he was not in Montana but probably over the Dakota line (Tr. p. 81). Where he was at the time the case was set for trial, or whether he was sent to Dakota by the plaintiff or whether his stay in Dakota was to be but temporary, was not revealed. Accordingly, objecting that the inability to call Bigelow was not shown by the mere fact that on the day of trial he was in Dakota, defendant, to preserve its rights, made formal "demand" that the witness be produced by the plaintiff. The court overruled this. Later, when that part of his testimony containing his negation of the existence of impeaching testimony was read, counsel again objected, frankly advised that impeaching testimony was available, renewed its "demand," to preserve its rights, that the witness should be produced for the purpose of impeachment, and the court

ruled that counsel should bring that up later. Thus, pursuant to the invitation of the court, counsel did "bring that up later," and then in its opinion the district judge characterizes this as repeated demands made by us that the plaintiff perform a miracle, whereas, in fact, it was merely a statement made to insure the preservation of defendant's rights to urge error in the premises.

As another miscellaneous example of the court's unfriendly action, at the close of the case and after the court had overruled a motion for a nonsuit, counsel, sounding the court for its views on an important issue of law in the case as to the responsibility for the negligence of the driver, says:

"I do not know what your Honor's views as to the law are, but if your Honor desires any authority as to the principle that the negligence of a driver of a private vehicle is imputed to the occupant, I can cite to your Honor a Montana authority"; to which *the court remarks*.

"Oh, everybody knows that."

Statements such as these, made in the presence of the jury, especially when repeated time and again, cannot but affect a jury adversely. Yet all defendant did was to sound the court respectfully on a proposition as to which there is some conflict in the authorities, a proposition also at least sufficiently worthy of consideration as to be the subject of careful opinions by our own Supreme Court and by the courts of other states.

Again, the witness John Lundquist testified for the defendant at this trial. An effort was made to discredit him by showing bias in favor of the Railway Company, in that he shipped goods "a little" over the defendant's railroad, there being no other railroad available to him. He was not on the best terms with the railroad. He had a lawsuit with the railroad once which he won, and he had claims still pending which the railroad had declined to pay, and he feels that he has been compelled to give them up (Tr. p. 181 to 182). If any of this was discrediting (at least that was the ~~effect~~^{object} of the testimony) defendant was entitled to show that no bias existed. Accordingly defendant showed on re-direct examination that the witness appeared pursuant to a subpoena. Next defendant asked whether the witness had not attended at the last trial as a witness for the plaintiffs, but the court sustained an objection that this was "wholly immaterial" and overruled an offer of proof that such was the fact.

Perhaps today, this ruling standing alone would not be considered reversible error. We think it was, as the court cannot pass on the weight which juries will give testimony. It is, however, highly important in the light of the accumulation of rulings referred to.

Again, in the instructions, upon being called upon to state any objections to the court's charge, ~~the~~ counsel called attention as a first objection to the fact that the court had instructed the jury that defendant would have

been negligent in the matter of the carcass if it was likely to frighten horses. Many witnesses conceded that horses would shy at a carcass. Few testified that they would shy to such an extent as to run away. Defendant asked that the court charge that, before the defendant could be held negligent, they must find that the carcass was an object, not only likely to frighten horses, but to frighten them to such an extent that they would run away. The court thereupon so charges the jury, and thus properly completes its charge, but only after *this proper correction urged by counsel is abruptly commented upon by the court as captious and unnecessary*, and the correction is made with the statement that it is mere duplication of what the court had already charged (Tr. p. 232).

Again, such statements made by the court in the presence of the jury, constituting comments on exceptions to the charge, cannot but prejudice the jury. Experience shows that a jury does not relish objections being made or corrections suggested to the court's charge. It is bad enough that such objections must be made in the presence of the jury. The court's comments upon such objections should, in the presence of the jury, be made only with a proper recognition of the delicacy of the situation. Certainly at such a time reflections upon such objections are prejudicial in fact.

Lastly, at the very close of the trial, defendant called the attention of the court to what the defendant conceived was improper conduct

throughout the trial, which might have affected the jury. We think the exception thus taken had abundant merit, but, in spite of the fact that it was couched in language entirely respectful, even deferential, the *court declined to recognize that even the slightest possibility* existed that the matters which we have reviewed could have affected the jury, and *merely remarks* again harshly that *the defendant is privileged to take such exceptions as it pleases*, and the court at no time indicates to the jury that they should not misunderstand anything in the action of the court, if it seemed to them that the court's action was prejudicial.

II

SPECIFICATIONS OF ERROR.

I—A

It was error in the court to overrule defendant's motion to strike certain portions and the whole of plaintiff's First Amended Complaint (Tr. p. 2-6; 36-42).

I—B

It was error in the court to overrule defendant's motion to strike certain portions and the whole of plaintiff's Second Amended Complaint (Tr. p. 45-57).

II—A

It was error in the court to overrule defendant's demurrer to the Second Amended Complaint herein, and it was error in the court to refuse defendant's request for an instruction to

return a verdict for the defendant (Tr. p. 14-15; p. 201).

III—C

It was error in the court to refuse defendant's requested instruction numbered 2C, as follows:

"No. 2C. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place and is no longer present and some one approaches such place and discovers, or by the exercise of reasonable diligence might have discovered the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause and in the occurrence of which its negligence was merely a condition or circumstance" (Tr. p. 203-207).

III—E

It was error in the court to refuse defendant's requested instruction numbered 2E as follows:

"No. 2E. Even if you find that the defendant railway company was negligent in any of the matters complained of, nevertheless, you cannot return a verdict for the plaintiffs if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees, knew, or discovered, or in the exercise of reasonable care should have known or discovered said negligence, if any, of said defendant and had the last clear chance to avoid the same and negligently failed to

avoid the same. If such is the case, then the negligence, if any, of said defendant is in law but a condition surrounding the accident and not, in law, a proximate cause of the accident, for no one is after discovering or having the means of discovering that another has been negligent entitled to thrust himself upon the negligence of another or blindly refuse to discover the negligence of another and if he does so, it is, in law, his own act or omission and not the negligence of the defendant which is the proximate cause of the injury" (Tr. p. 203-207).

IV—A

It was error in the court to charge the jury as follows:

"Defendant furthermore sets up a plea of contributory negligence, that is to say, it alleges that if it was negligent in and about the situation of this carcass, that when the plaintiffs' driver Bigelow took the wife through that place, he was negligent in his driving, and that this negligence contributed to the injury, and without it the injury would not have happened.

"Now at this point comes this proposition: The issue in reference to the contributory negligence alleged against the driver Bigelow, and, in reference to that, all the court has heard in the way of evidence is that Bigelow had been drinking that day.

"Contributory negligence means that a party who is laying a claim against another person for his negligence, was himself lacking in ordinary care due for his own safety. In other words, even though the defendant was negligent in leaving the carcass there, and even though it frightened the team, yet if Bigelow had driven with ordinary care and thus prevented the accident, then his negligence contributed to the injury. Unless you find by a preponderance of the evidence that he did not so drive, why,

you put the question of contributory negligence out of sight." (Tr. p. 216, 223-225).

IV—B

It was error in the court in its charge to rule that the doctrine of the last chance had no application to this case and to limit the issue of contributory negligence to the method of driving, and to instruct the jury that other matters of contributory negligence, such as the duty of the deceased not to thrust herself upon defendant's negligence, might be laid aside, and not to charge that the deceased had no right to thrust herself upon the negligence of the defendant, as the answer pleads, and the proof shows that whatever dangers existed the deceased and her agents knew of them, or had the last clear chance, by the exercise of reasonable care, to avoid them.

IV—C

It was error in the court to overrule the following exception and objection to the court's charge:

"We except further on the ground that the instructions do not cover all of the issues. Our contention is that no one has a right to thrust himself upon the negligence, if any, of another. The answer specially pleads that, that whatever dangers were existing, the plaintiffs, or their representative knew, and at least had the last clear chance to avoid it in the exercise of reasonable care; and the proof shows that there were other ways by which the Ennis ranch could be reached, and the instructions do not cover that phase at all.

"Your Honor has limited the issue of con-

tributory negligence to the manner of driving, and has not charged the jury as to the duty of the driver or the plaintiffs in any way to avoid the alleged negligence of the defendant, not only in the manner of driving, but by using another road, or in any other respect. In fact, the court charges the jury that the last clear chance doctrine as regards the plaintiff's negligence, and any negligence of the driver, other than his manner of driving, may be laid aside.

“By the Court:—In the light of the testimony as to the use made of the road, I do not think the driver was bound to use another road; by placing the carcass there you cannot foreclose him from using that road. Your exception will be noted” (Tr. p. 234-235).

V—B

It was error in the court to refuse defendant's requested instruction numbered 4B, as follows:

“No. 4B. The railway company was not, in any event under any absolute duty to remove the carcass in question, if you find that the carcass caused the runaway; it was at least under not more than an alternate duty, that is to say, to exercise reasonable care to remove the carcass or to exercise reasonable care to give warning of the dangers, if any, which might arise from its presence, if you find that such dangers existed. And, in this connection, a knowledge by any person of such dangers, if any, or the fact, if it is a fact, that, in the exercise of reasonable care, such person would know of such dangers, if any, would dispense with any necessity of giving such person warning” (Tr. p. 208).

VI—B

It was error in the court to instruct the jury that the way in question was treated by all parties as a public highway, and not to define

the measure of responsibility in the event that the jury should find that the way in question was merely a way by invitation.

VII—A

It was error in the court to charge the jury as follows:

“Briefly the issues in this case are: Is the defendant responsible at all for the placing of this carcass at the place where the evidence shows it was? In brief, it might be, did the defendant’s railway train kill and throw this carcass in that position along this roadway? If that issue is determined against the defendant, then the next question would be, whether or not, in so allowing it to remain there, the defendant was negligent.

“In this case, if you find that the defendant had killed this horse by one of its trains, and threw it down below the traveled part of this sixty-foot highway across its line, and left it there from January or December, until April, and that when April came, on the day when this lady was crossing there, the appearance of the carcass, and the odors from it were such as tended to frighten the ordinary teams that would pass over the highway, and teams of ordinary gentleness and training, why, you would be justified in finding that the defendant was negligent in leaving the carcass there, under those circumstances” (Tr. p. 216 and 219).

VII—B

It was error in the court to instruct the jury that the railway company placed the carcass near the roadway, if the horse was killed by being struck by a train and thrown there, irrespective of whether or not the railway company was negligent in the operation of the train, and

without proof of any act of the railway company justifying the submission of such an issue as to the placing of the carcass.

VII—C

It was error in the court to overrule the following objection and exception to the court's charge, to-wit:

"In regard to the placing of the carcass, your Honor has instructed the jury that, if the carcass was placed there by being struck by a train that would consist of the act of placing the carcass. We except on the ground that the act of placing the carcass has not been proven, and there is no proof of such a fact. We also except on the ground that we should not be liable for the placing of the animal unless we were negligent in the placing in the first place; that is, unless it amounts to negligence in the operation of the train that struck it" (Tr. p. 234).

VIII—B

It was error in the court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (William Gardner) that the driver Bigelow was at all times prior to the accident addicted to the habitual and excessive use of intoxicating liquors, and was, to the knowledge of the witness, usually under the influence of excessive use of liquor, sufficient to make dull his senses whenever, prior to the accident, he came to Bainville at any time prior thereto six months before the accident" (Tr. p. 136).

VIII—C

It was error in the court to overrule the following offer of proof:

"We offer to prove by the witness now on

the stand (Charles Hubener) that for about a year previous to Bigelow's starting to work for Dr. Ennis, Bigelow was working for the witness in the saloon business as a bartender; that witness offered during the said period to give Bigelow a share in the business if he would keep sober and not get intoxicated, but that Bigelow was nearly always during said period so intoxicated that he could not attend to the business, and finally the witness discharged him because the witness had observed that he was an habitual drunkard" (Tr. p. 239).

IX—B

It was error in the court to overrule the following offer of proof:

"We offer to prove by the witness now on the stand (Charles Hubener) that shortly after the accident, the witness was talking with Bigelow about the accident, and that Bigelow then told him that it was a piece of paper that caused the horses to run away, and not the carcass referred to in the testimony" (Tr. p. 143).

IX—A

It was error in the court to deny the defendant the right to withdraw its disclaimer of any intention to impeach the witness Bigelow and to permit the plaintiffs to read into the evidence the following question propounded to, and the following answer given by, the witness Bigelow:

"Q. Did you ever, at any time or at any place; make any statement to anyone to the effect that this runaway had been caused by the horses becoming frightened at a piece of paper and not by the carcass?"

"A. No, sir." (Tr. p. 93.)

It was error in the court to overrule the following objection to the admission of the testimony of the witness Bigelow on the former trial, and to admit said testimony:

“We object to the admission of the testimony of the witness Bigelow, taken on the former trial, because the transcript of his testimony constitutes mere hearsay, and the witness Bigelow himself must be called, and the inability to call him has not been sufficiently established, and because at the time Bigelow was examined at the time of the last trial, we did not have impeaching testimony, and we examined him at the last trial for the purpose of ascertaining if there was any impeaching testimony available, but since then we have secured impeaching testimony” (Tr. p. 281).

X—B

It was error in the court to permit the plaintiffs to read in evidence the following questions and answers in the cross-examination of the witness, Mrs. Charles Allison:

“Q. Did Mrs. Ennis say anything to you at that time about his having had any liquor, or anything like that?”

“A. No, she did not.”

“Q. Did she say anything after the accident about him having had any liquor?”

“A. No, sir.”

“To which questions and answers the defendant objected, on the ground that it had waived the cross-examination, and therefore none of the cross-examination should be read in evidence, and in so far as the same is admitted as cross-examination, it is a cross-examination as to a matter concerning which the defendant was forced to enter, by reason of the improper

questions asked in the direct examination, in regard to the declaration of Mrs. Ennis, there being, at the time the deposition was taken, no one present who could rule on the competency of said testimony, and said questions in cross-examination were asked merely for the purpose of developing anything that is pretended to have been said by Mrs. Ennis, we thus seeking to sound the reliability of the witness' testimony as regards the alleged conversation, and the same is hearsay, incompetent and irrelevant" (Tr. p. 102, 199).

X—D

It was error in the court to permit the plaintiffs to read in evidence the following question and answer in the cross-examination of the witness Mrs. Charles Allison, and to overrule the defendant's objection thereto, as follows:

"Q. And during those conversations did she say anything about Mr. Bigelow having been drinking that day?"

Which said question was objected to for the reasons set forth in the Assignment X-B.

"A. No, sir, she did not." (Tr. p. 103).

XII

The court was guilty of irregularities and abused its discretion in the course of the trial, whereby the defendant was prevented from having a fair trial, as follows:

"1. On the matters resting generally and as separate rulings in the discretion of the court, and on matters not of themselves separately assignable as errors the court ruled so frequently adversely to the defendant that though such rulings, as separate rulings, are not assignable as errors, the defendant was, by the

number thereof, unduly hampered in the examination of witnesses and prejudiced in the eyes of the jury.

“2. The court unduly, unnecessarily, improperly, frequently and without justification, restricted defendant in the examination of witnesses and prevented defendant from fully presenting the testimony favorable to the defendant, and material, competent and relevant to its defenses.

“3. The court unwittingly ridiculed before the jury defendant’s defense that the driver Bigelow, referred to in the testimony, was under the influence of intoxicating liquor at the times complained of; the defense that the carcass did not give forth odor, and did not cause the runaway; the defense that the driver Bigelow had the last clear chance to avoid defendant’s negligence, if any, and every defense interposed by defendant by statements made by the court in the trial, first excluding testimony in support of these defenses, and by afterwards permitting some of such testimony to be received, accompanied by comments by the court, adverse to such testimony, and otherwise causing the jury to believe that the defendant’s competent, and relevant testimony was not such, and was admitted merely by the indulgence of the court, and ought not and would not be considered by the jury, as affecting the case.

“4. The court in the trial permitted itself to assume, or appear to assume, a repeatedly harsh, hostile and prejudiced manner towards defendant, its witnesses and its counsel, whereby defendant was hampered in the examination of witnesses and prejudiced in the eyes of the jury.

“5. In other respects, the court was guilty of irregularities, and of abuse of discretion.”

III

ARGUMENT.

(A)

Plaintiff's Effort to Repudiate Election Made.

When plaintiff alleged in his first complaint that the road in question was a public highway, and the court ruled at the previous trial that the plaintiff could not recover unless he proved that the road in question was a public highway and that the evidence up to that time was not sufficient for that purpose, plaintiff had two courses open: First, he could have excepted to the court's ruling, completed all of his proof and taken a judgment of non-suit, and then had the ruling reviewed if he desired; or Second, he could have accepted and abided by the ruling of the court and been governed accordingly, amending his pleadings and taking a continuance, because of the changed issues.

He elected to pursue the latter course, and accordingly, not excepting to, and, on the contrary, accepting the ruling of the court, and seeking to obtain the advantage of avoiding a non-suit, the plaintiff applies to the court for leave to file an amended complaint expressly striking out and abandoning the allegations that the roadway in question was a public highway. Manifestly this formal election to pursue the case on the theory of an invited way, and this formal acceptance of the benefits thereby arising in avoiding a non-suit, constituted a bar to any

return to the theory that the road was a public highway.

Otherwise there never would be an end to litigation.

At the previous hearing the plaintiff sought to prove the road a public highway and the defendant was prepared to disprove it, and the plaintiff formally advised the court that he was unable to prove this, and, to get the advantage of avoiding a non-suit, he advised the court that he desires to proceed to prove that the way is a licensed way, but he cannot both take the benefit of such an election, and afterwards repudiate it when he finds that such second election does not authorize a recovery.

In support of the proposition that the prior proceeding taken in this litigation estops the plaintiff from his present course, analogous to an election of remedies or the estoppel of a former judgment, we cite the following authorities:

16 Cyc. page 787 and 796, Sub. Estoppel.

Quasi Estoppel: Acceptance of Benefits:—Where one having the right to accept or reject a transaction takes and receives benefits thereunder he becomes bound by the transaction and cannot avoid its obligations or effect by taking a position inconsistent therewith.

Prior Claim or Position in Judicial Proceedings:—A party who has, with knowledge of the facts, assumed a particular position in judicial proceedings, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party.

Valdes v. Central Altogracia, 225 U. S. 58;
32 Sup. Ct. 664, at 670; 56 L. Ed. 980.

Davis v. Wakelee, 156 U. S. 680; 15 Sup. Ct. 555, at 558; 39 L. Ed. 578.

Robb v. Vos, 155 U. S. 13; 15 Sup. Ct. 4, at 13; 39 L. Ed. 52.

McSweeney Packing Co. v. Beshlin, 211 Fed. 922, at 924.

McNeil v. McNeil, 170 Fed. 289, at 290-291; 95 C. C. A. 485.

Shakelton v. Baggsley, 170 Fed. 57, at 59; 95 C. C. A. 485.

Therefore, the motions to strike portions of the first and second amended complaints, notwithstanding the disclaimer of counsel then made, should have been sustained, and the court erred in submitting the cause on the basis of the roadway being a public highway by estoppel, and in not submitting the cause on the basis of the roadway being a mere invited or licensed way.

(B)

No Negligence of Defendant.

We contend that the proof fails to show that there was any negligence on the part of defendant, because wherever recovery is allowed in this kind of case, the proof must show that the object complained of was an object, not merely likely to frighten horses generally, but that it was likely to frighten horses of ordinary gentleness, and then to such an extent as to cause them to run away.

Secondly, the proof showed that the carcass was between the road fences and thus on a part of the roadway (Tr. p. 267), and therefore, on

the theory that the road was a public highway, if it was such for one purpose, it was such for all purposes, and the county, and not the defendant, would be liable for the condition of the highway, unless defendant was at fault in the original placing of the carcass, as to which fault there was no proof.

As regards the first defect above noted, it is true that the plaintiff's proof was to the effect that the horses in question were frightened by this carcass and ran away, and that he thought they were gentle horses, but proof that in a particular instance, especially an instance of this kind, where an alleged gentle team, after having been scared by a piece of paper but a moment before, as is admitted, ran away, is not proof that the carcass is apt or likely in other instances to frighten horses of ordinary gentleness so that they will run away. The proof that in a single instance an alleged gentle team was frightened is not proof that this is the ordinary or apt, or likely effect of the article on horses of ordinary gentleness.

Plaintiff himself testified that he was an expert horseman and that, before the runaway he did not warn his wife of the presence of the carcass, and that if he had thought it an object likely to frighten the horses to such an extent that they would run away he would have warned her (Tr. p. 74).

All of the plaintiff's proof on the effect of the carcass will be found on the following pages of the transcript: 67-69, 74-77, 84-89, 99, 100,

104, 106-108; 114-116, 137, 138, 144, 154, 161-162, 177, 179 180, 194.

A careful reading will disclose it is indefinite, and amounts to no more than a statement that anything may possibly scare any horse, and that "horses" shy at a carcass, and may run away, though none of the witnesses ever heard of such an instance before (Tr. p. 116), and as to whether such a familiar object as a carcass is apt to frighten horses of ordinary gentleness so that they will run away, no attempt is made to meet such an issue. Because of this want of allegation in the proof, the complaint, as well as the proof was fatally defective.

No. Ala. Ry. Co. v. Sides, 26 So. 116.

Kumba v. Gilham, 79 N. W. 325.

Witham v. Bangor R. Co. 52 Atl. 764.

Patmonde v. N. Y. N. H. & H. R. Co. 61 N. E. 813.

In the second place, the proof showed that the carcass lay between the railroad wing fences extending from the outer right of way line and the track, and therefore on the land claimed to be a part of the public highway (Tr. p. 67, 100, 103, 126, 128). There was no proof as to how it got there, except that trains passed in the night and the section foreman had directed someone to report that it was killed by the railroad, though he did not himself know (Tr. p. 74, 126-127). But even assuming that it was killed by collision with a train, there was nothing showing that defendant was negligent in the operation of its trains, or in the killing of the

animals, not to mention that someone may have forced the animal on the track ahead of an oncoming train. It is probable that the animal may have simply wandered along the public highway and been struck by the train as an unavoidable accident.

There was no proof on this, and hence there was no proof that defendant was guilty of any fault in the original placing of the carcass there, and clearly, if the animal was struck by a train and thrown into the highway without any fault of the defendant, the defendant was not responsible for the alleged nuisance, and, it being within the highway, was under no obligation to clean the highway of articles found there, not as the result of any wilful placing or of any negligent act of the defendant in the operation of its trains: if the road was a highway for one purpose, it was such for all purposes, and the county alone or the owner of the animal for negligently allowing it to run at large, and not the railroad, would be under a duty to remove the carcass.

It is fair to ask the plaintiff to cite some authority to the effect that one whose negligence is not shown to have contributed to the creation of a nuisance on a highway can thus, without fault on its part, be placed in fault for not abating that which has arisen without its fault.

(C)

Defendant's Negligence Not a Legal Cause.

To the defense that for months before the accident the plaintiff knew of whatever condi-

tions existed there and did nothing whatever to avoid defendant's supposed negligence, we especially invite the court's attention. Defendant's proof shows contributory negligence on the part of the plaintiff. It also shows that defendant's negligence was not a cause of the accident, but a mere prior surrounding condition, for it is a general principle of law that where one person has been negligent, and another discovers that negligence and has the last clear chance to avoid the consequences, then such prior negligence, whether of a defendant or of a plaintiff, ceases to be a legal or proximate cause of the accident, and is rather a mere condition.

This rule finds illustration today more frequently when a plaintiff is guilty of negligence which the defendant, however, has the last clear chance to avoid, but examples are not wanting where the reverse situation has arisen. Indeed, the rule that the plaintiff, discovering defendant's negligence, cannot thrust himself upon it, is older than the former illustration of the last clear chance doctrine, so often appealed to by plaintiffs.

Thus the famous case of *Davies v. Mann*, 10 M. & W. 546, the earliest enunciation of the last clear chance doctrine, as applied to relieve the plaintiff of his negligence, is itself expressly based on the earlier and equally famous case of *Butterfield v. Forester*, 11 East 60, holding that where defendant is negligent, but the plaintiff, discovering it, has the last clear chance to avoid

that negligence, the plaintiff's own negligence is the immediate and proximate cause, and he cannot recover.

Now let us ascertain to what extent the proof shows that the present case is within this well settled doctrine. In fact, the law here is not disputed. It is simply the application of the proof to the law.

The proof showed that the carcass was first seen by the plaintiff himself at the place in question in the December preceding April 18th, the day on which the accident happened, and he, during January, February, March and April, had frequent occasions to drive from his ranch over the crossing to Bainville, and noticed the carcass and whatever effect it had on horses (Tr. p. 67, 68, 74). The driver in question had been in the plaintiff's employ on the ranch and knew all about the location of the carcass and its effect upon horses (Tr. p. 84, 87-88) and the plaintiff, at first denying it at this trial, admitted the truth of his testimony at a previous preliminary hearing, that he and the driver had discussed the location of the carcass and its effect upon the horses (Tr. p. 75-76). Everybody had seen the carcass (Tr. p. 99-100, 114-120).

So, as a first important fact, it is undisputed that *the plaintiff and the driver*, each of whom were *expert horsemen, for weeks and even months had known* of the presence of the carcass and its effect upon horses. Surely, as expert horsemen, they can be held to such

knowledge in the premises, as they say a railroad company should have known.

Notice also that in the complaint finally filed, plaintiff realizing this to be necessary to his recovery, expressly charges that he did not know the carcass would cause a runaway (Tr. p. 12). This allegation was inserted adversely but was utterly disproved; he at least knew what the railroad company would know.

Notice next that it is not a case where a person driving along a road for the first time passes a dangerous object and is thereby entrapped.

Moreover it is *not even* a case where, *passing an object safely for the first time*, a person is under the necessity of returning the same way, and therefore necessarily passes it again. Here is a case where for months the plaintiff and the driver had been up and down the road over this crossing and knew of the conditions.

Again, it is *not* a case where *the defendant* would have peculiar knowledge of the existence of the object and of its dangers; *on the contrary*, it is a case where *the plaintiff*, as has been shown, and will be further shown, *had peculiar knowledge of* the existence of the carcass, and as expert horsemen (Tr. p. 69, 82) he and his driver would be in a better situation than the defendant to appreciate the supposed dangers and what should be done.

Still again, it is not a case of a person who comes in contact with an object in the course of driving along a highway in the course of a

journey of some length. *This carcass was right at the plaintiff's own door.* The Hanson and Ennis ranches on the northerly or easterly side of the track were not divided by any fences. They were practically one and the same ranch (Tr. p. 122). Accordingly we find (Exhibit 1) that after coming from Bainville the road ends at the track and is then planked across the track and then runs abruptly into the joint gate of the Hanson and Ennis ranches, probably one hundred feet from the track (Tr. p. 71, 114), and plaintiff's house was about 150 rods from the crossing (Tr. p. 62).

So, if the runaway was not caused by the driver's condition and contributory negligence, or if it was anything other than a plain accident, the same obligation which the plaintiff says rested upon the Railway Company to remove the carcass would require him and the driver, in the exercise of reasonable care, to avoid defendant's discovered negligence, to *get a pick or a shovel from the ranch and remove or bury the carcass*, thus said to threaten not only their own safety, but the safety of all persons on the highway.

So we emphasize that the dangerous object was not encountered by the traveler, merely in the course of a journey along the highway. *It was on the highway right at the very gate of the persons who are here saying that the railway company was at fault.*

Still further we note that the evidence of the plaintiff himself showed that *he saw* that the defendant had attempted to do what it consider-

ed necessary in the premises (Tr. p. 67). The carcass was burned once, but not very well, and then two more attempts were made by the defendant to burn it (Tr. p. 67, 120-121, 188, 190). Moreover dogs and coyotes had later so eaten it up that it was practically gone (Tr. p. 68, 69, 104, 117, 125).

Clearly plaintiff saw that defendant had done what it conceived necessary in the premises and yet *the plaintiff makes no complaint or suggestions* to the defendant (Tr. p. 75), although he knew the section foreman well, and also the roadmaster and agent (Tr. p. 67, 73, 80), and the section foreman was daily up and down the railroad which extended right past the plaintiff's house (Tr. p. 62), and the station at Bainville at its then new location (New Bainville) was but a few feet westerly of the crossing, where also plaintiff was acquainted with defendant's agent (Tr. p. 73).

So it is a case where plaintiff as an expert horseman knows the conditions and what should be done, and seeing defendant's alleged negligence, and alleged negligent attempts or failures, makes no complaint, and gives no suggestions, but thrusts himself on defendant's negligence.

The proof also showed that *there was another road* from town to the ranch, this road being but two and one-half miles longer than the one taken—surely not an extraordinary journey to avoid conditions which plaintiff and the driver, as expert horsemen, claimed threatened death. At least such a trip would not be inconvenient

until such a time as they would make up for their own neglect in not complaining to defendant's many available representatives, or in not themselves removing or burying the carcass, a condition which indeed, if as threatening as they allege it to be, humanity alone, and a regard for the safety of the community, would have prompted them to abate.

It is true that the plaintiff said that the other road involved a trip of six miles which he later cut down to four or five miles, but when confronted with his former testimony, he admitted that it was but about two and one-half miles longer (Tr. p. 72-73).

A prettier illustration of the duty of a party not to cast himself upon the negligence of another could hardly arise. We contend, therefore, that the court should have granted our motion for a non-suit and our request for a directed verdict on this ground. At least our requested instructions, numbered II-A to II-F should have been given, but the court ruled that should have been given, but THE COURT RULED THAT THIS WAS NOT EVEN A QUESTION OF FACT FOR THE JURY, and overruled our objections to the instructions because of this ruling, and because of the failure to instruct the jury on this issue.

The authorities on the principles applicable here are mountain high (See notes 28 Cyc 1418, 1422-30, 1510-14; 37 Cyc 295-298, 314-315; 29 Cyc. 515, where there must be a thousand cases collected). We have read a great many of these

cases. They illustrate the absolute impossibility of "case law" being a practical assistance to lawyers or courts, where the decisions are merely valuable because of their number and, the principle being conceded, they contain no valuable discussion.

From these decisions both the plaintiff and the defendant will concede the following principles: (1) That a plaintiff knowing of a defendant's negligence must not thrust himself upon it, but must exercise reasonable care to avoid it; (2) mere knowledge of a defect or obstruction in a highway is not always enough to establish contributory negligence as a matter of law in a person who attempts to pass it; (3) whether a person is negligent in attempting to pass a known obstruction, or in not avoiding it, is ordinarily a question of fact for the jury, and (4) where the facts are undisputed the Court may determine the issue.

Where the parties differ, ^{is} ~~is~~ this, and only this: The plaintiff will contend that the Court was right in holding that the case was in the fourth subdivision in the sense that there was no evidence that plaintiff could by the exercise of ordinary care have avoided the injury; the defendant, on the other hand, agreeing that the case is in the fourth subdivision, points out that the evidence showed, not only (a) that the plaintiff knew of the defect, and (b) appreciated the risks, but also (1) the following facts distinguishing the case from others where plaintiff's negligence has been submitted to the jury; (2)

that plaintiff had known of the existence of the carcass for months; (3) that the dangers, if any flowing from it would be peculiarly familiar only to horsemen like himself, if to anyone, and would not ordinarily be known to defendant railway company, or anyone other than horsemen; (4) that he knew defendant's representatives had attempted to do what seemed sufficient; (5) that he made no complaint to them of the condition generally, or of their inadequate handling of the situation, and lastly (6) that the carcass was right at his own door and could easily have been removed by him, with a shovel or team. By reason of these six facts defendant contends (a) that under the disputed evidence as to the horses being "as gentle as kittens," on the one hand, or "a nervous, high-strung team," on the other, it was at least for the jury to say whether the plaintiff should have used the road at all or whether he should have used the other road, or himself abated the alleged nuisance, or advised defendant, from his experienced judgment in the handling of horses, as to the alleged probable consequence of its failure, in its several attempts, adequately to meet the situation. Indeed (b), under this evidence, the issue of contributory negligence was established as a matter of law. We quote from

Dist. of Columbia v. Moulton, 182 U. S. 576; 21 S. Ct. 840; 45 L. Ed. 1237:

"***it is requisite that the municipality causing the obstruction should give reasonable notice to the traveling public of its presence, but that a view of the obstruction itself in time to avoid

it without injury amounts to notice. In other words, as stated by the Maine court, 'no one needs notice of what he already knows,' and 'knowledge of the danger is equivalent to prior notice.' 91 Me. 296, 39 Atl. 1000. That the plaintiff had notice of the presence of the roller on the Park street in ample time to have avoided it is undisputed. When he turned from Fourteenth street into Park street it was broad daylight, there was nothing to obstruct his view westward, and in fact he testified that the roller was in plain sight. He was not induced or directed by the agents of the District to proceed past the roller. He knew that such objects sometimes frightened horses, but from his acquaintance with the disposition of his horse he believed that he could control the animal and drive safely past the roller, and he voluntarily undertook to do so. Now, it seems clear—particularly as the danger was neither hidden nor concealed—that the District was under no obligation to restrain the plaintiff from attempting to pass, either by closing Park street or by other means. The District was not bound to presume that it would be necessarily hazardous to attempt to drive past the roller, stationary and quiet as it was, and familiar as horses in a large city usually are to the sight and sounds of electric and cable cars and horseless motors. *The District, at best, was only chargeable with notice that the roller was an object which might frighten some horses of ordinary gentleness, not that it would inevitably do so. It was bound to give sufficient warning to drivers of the presence of the roller in time to enable them to avoid passing it, if desired.* The District, however, had a right to assume that a driver of mature age was familiar with the habits and disposition of his horse, and was possessed of the common knowledge respecting the tendency of steam rollers to occasionally frighten such animals. The roller being lawfully on the street, the District was not bound to guard against the consequences of a voluntary attempt to drive by this roller. *Certainly if a*

driver believed that it would not be the natural and proper consequence of such an attempt that his safety would be endangered, the District ought not to be charged with notice that the attempt would be dangerous either to life or limb."

In that case the Supreme Court reversed the decision of the trial court submitting the issue of contributory negligence. A similar ruling should be made here. At least defendant was entitled to have the jury pass on the issue.

(D)

RULINGS ON EVIDENCE.

We will now consider the rulings on the evidence.

(a) Habitual Excessive Use of Liquor by the Driver.

The several written offers involve the right of the defendant to show that the driver, when intoxicating liquor was available, always habitually availed thereof, and used the same habitually for a period covering six months immediately prior to the accident, but all of these offers were rejected.

We must be brief. There is a conflict in the authorities as to whether habit in the use of intoxicating liquor is admissible to prove a person's condition at a particular time. Habit or disposition in many other matters is admissible to prove a fact. Common sense is to the effect that such evidence is admissible. Specific instances may not have any probative value, but habit or disposition is received by the mass of

mankind as very persuasive evidence in matters of this kind, and should not be excluded by any arbitrary rules of evidence.

- Alcock v. Assur Co. 13 Q. B. 292.
Cosgrove v. Pitman 103 Cal. 269; 37 Pac. 232.
Pa. R. Co. v. Books 57 Pa. 339 at 343.
Huntington Etc. R. Co. v. Decker 82 Pa. 119.
M. K. & T. Ry. Co. v. Jones 75 S. W. 53 at 55.
McCandles v. McWha 25 Pa. 95.
M. K. & T. Ry. Co. v. Jones 75 S. W. 54 at 55.
Curtis v. Tacoma Car Whs. Co. 63 Atl. 400
73 N. H. 516.
Laeve v. M. K. & T. Ry. Co. 136 S. W. 1129
at 1131.
Smith's Executor v. Smith 67 Vt. 443, 32
Atl. 255.

However this may be, the case in question does not involve the use of mere habit as evidence. Here the defendant sought to show not only the habit of the driver when intoxicating liquor was available, but also that the liquor was available. When so coupled up the proof is proper. The following quotation from the case last cited clearly shows the court's error in this instance:

"It was error to say***that evidence touching the testator's habits of intoxication had no bearing upon the question of his condition at the time the will was executed. In the case of a man who is shown to have taken one drink and who has liquor at his command, an habitual lack of restraint in regard to it would increase the probability that he had taken more than could be directly proved, and so strengthen the probability that he was in the condition testified to by contestant's witnesses."

Moreover, in reading in evidence certain de-

positions, defendant waived the cross examination, and thereupon plaintiff read it. The cross examination thus became plaintiff's own proof and as the plaintiff elected to read also that part thereof relating to the habits of the driver, this became proof of plaintiff in his own case introduced at his instance and defendant was entitled to rebut it. Tr. p. 101, 110-113.)

(b) *The Driver's Inconsistent Statements.*

The driver testified that just before the time when he claims that the horses were frightened by the carcass, they had at the top of a hill on the approach to the crossing been frightened by a piece of paper. He admitted afterwards that this occurred near the bottom of the hill nearer to the carcass (Tr. p. 85, 89, 91-92). Defendant's proof showed that this was what caused the runaway (Tr. p. 164-176). Defendant sought to show that the driver made inconsistent statements to the effect that it was this paper, and not the carcass which caused the runaway (Tr. p. 134-135, 143, 163).

First, as regards the driver's testimony at the former trial being admitted at all. In accounting for his absence all that was shown was that he was, at the time of the trial, in Dakota, but nothing was done to show when he went there, or how long he would be there or efforts made to get him or why he was not served with a subpoena. This showing was not sufficient. The witness must be shown to be a non-resident

or absent in the sense of a permanent or indefinite absence.

State v. Banks, 31 So. 53.
Thompson v. State, 17 So. 512.
Hill v. Winston, 75 N. W. 1030.
South v. State, 6 So. 51.
Perry v. State, 6 So. 425.
Lucas v. State, 11 So. 216.
Shesson v. Burlington, 47 Ia. 302.

Moreover, we think, in the light of the driver's absence, that the rule of the statute in regard to impeachment was subject to a logical qualification, and that under such circumstances the witness may be impeached without any more definite foundation being laid.

So. Ry. Co. v. Williams, 21 So. 328 (dictum).
Cronkrite v. Trexler, 41 Atl. 22.
Hedge v. Clapp, 22 Conn. 266.
Kay v. Fredigal, 3 Pa. St. 221, 223.
McKee v. Jones, 6 Pa. St. 425, at 429.
Gaines v. Com. 50 Pa. St. 328.
Walden v. Finch, 70 Pa. St. 436.
Brubaker v. Taylor, 76 Pa. St. 83, at 87.
Dodgett v. Tolman, 8 Conn. 171, at 177.
Fletcher v. Henley, 13 La. (La.) Ann. 192.
Holman v. Bank, 12 Ala. 409.
Tucker v. Welsh, 17 Mass. 164.
Downer v. Dana, 19 Vt. 346.
Hazard v. Ry. Co., 2 R. I. 62.
Billings v. Ins. Co., 70 Vt. 477; 41 Atl. 516.

But in the light of changed conditions defendant was entitled to withdraw its disclaimer and upon its withdrawing its disclaimer, the testimony became incompetent. Indeed defendant was entitled as an absolute right to withdraw the question and answer. In 13 Cyc. Sub Depositions, page 985, it is said:

“A deposition may be good in part and bad in part. The party proposing to use it must use it only to prove that part which is competent for him to prove, and in introducing or reading it in evidence he may omit incompetent or irrelevant facts or statements therein contained and answers which are not responsive, and where part of the evidence is admissible it is error to reject the whole.”

Indeed defendant had an absolute right to withdraw the question and answer as a part of the cross-examination. It was not directly connected with the remainder of the cross-examination or necessary to explain the preceding part. In such cases it is well settled that a party is not compelled to read in evidence all of his interrogatories and the answers thereto, but need read only all necessary to understand that part of the deposition which he asks to have read as to a certain issue. Many authorities are to the effect that a party is entitled to read such part of a deposition as he desires, leaving the other party to read the remaining part, but at any rate, whatever may be the rule in this respect, the matter in hand being an independent matter, not a part or a necessary explanation of the preceding cross-examination, defendant could certainly decline to read that part.

Bowen v. Durant, 140 N. W. 728.

Forbes v. Snyder, 94 Ill. 374 (see note 13 Cyc 985).

Sherrer v. Everest 168 Fed. 822 at 826.

Central Coal Co. v. Penny, 173 Fed. 340 at 346.

Crotty v Chicago Etc. R. Co., 169 Fed. 593 at 595.

First Nat'l Bank v. Elevator Co., 91 N. W. 436.

Guessner v. Hawks, 101 N. W. 893.

Water v. Sperry, 85 Atl 739, at 742.

Lanahan v. Lawton, 23 Atl. 476.

Watson v. St. Paul City R. Co., 79 N. W. 308.

Bank v. Rhusasel, 25 N. W. 261, at 262.

Plaintiff, however, was, under the above authorities, entitled, if it desired, to read in evidence any other competent portion of the cross examination, or incompetent, if not objected to the defendant, but in such case the part so read by the plaintiff becomes plaintiff's proof, competent or incompetent. Thus in *Smith v. Bank*, 26 N. W. 234, the court says:

"With reference to the objections taken to particular questions and answers, we think the proper rule is that when a party uses a deposition taken, but not used, by his opponent, he makes it his own, and his opponent has the same right of objection to the interrogatories and answers as respects matter and substance, as if the deposition had been taken by the party offering it in evidence."

Keller v. C. B. & Q., Ill N. W. 384.

McCutchen v. Jackson, 40 S. W. 177.

Reed v. Holloway, 127 S. W. 1189, at 1192.

Magee v. Paul, 159 S. W. 325, at 328.

Ches. Stone Co. v. Fossett, 100 S. W. 825.

Ry. Co. v. Ritter, 41 S. W. 753.

Doggett v. Green, 98 N. E. 219, at 220.

In re Smith, 26 N. W. 234.

As this testimony of the declarations of the driver thus became, not cross-examination by the defendant, but testimony of substance introduced at the instance of the plaintiff, the defendant was entitled, whether the same was com-

petent or incompetent, to rebut evidence thus constituting a part of the plaintiff's case.

Morgan v. State, 88 Ala. 223; 6 So. 761.
Mobile Elec. R. Co. v. Ladd, 92 Ala. 287;
9 So. 169.

McIntyre v. White, 124 Ala. 177; 26 So. 937.
Perkins v. Hayward, 124 Ind. 449; 24 N. E.
1033.

Nost v. Rosecrans, 66 Ia. 405, 407; 23 N. W.
895.

Spaulding v. R. Co., 98 Ia. 205; 67 N. W. 227.
Hamilton v. Co., 94 N. W. 282.

State v. Slack 69 Vt. 486; 38 Atl. 311.

Sisler v. Shaffer, 43 W. Va. 769; 28 S. E.
721.

In any event the declarations of the driver that it was a piece of paper and not the carcass, were admissible by the express provision of the statutes of Montana. Remember that these declarations are not the declarations of a mere eye-witness or bystander; they are the declarations of the plaintiff himself. The driver stood in the shoes of the plaintiff. *He was the sole active representative of the plaintiff's case, and his duty in the premises was in issue.*

In such a case, although it is well settled, of course, that the declarations of a bystander, whether an agent or not, made after the fact, are not admissible when not made in the course of his agency, our statutes clearly recognize that when the agent is the sole acting representative of the plaintiff's case, and his conduct is in issue, whatever would be evidence for or against him is evidence for or against the parties here.

Thus Section 7868 of the Revised Codes of Montana provides:

“Where a question in dispute between the parties is the obligation or *duty* of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties.”

It will be observed that this statute is not limited to contract obligation. It includes cases of “duty” and clearly the duty of the driver as the sole responsible acting representative of the plaintiff’s case was in issue here.

The previous sections of this statute recognize the hearsay rule and cover its exceptions. Really this section is but a part of three preceding sections.

Thus Section 7865 provides the general rule that the rights of a party are not affected by any declaration of a third person, and that such declarations cannot be received in evidence. This is the general recognition of the hearsay rule.

Then Section 7866 provides for the exception in cases of declarations by prior holders of title.

Then Section 7867 provides for the exception in the case of oral acts and the *res gestae*.

Then comes the section in question and this section is also followed by Section 7869 relating to the exceptions in cases of pedigree, and Section 7870 relating to declarations against a pecuniary interest.

The instant case comes within said Section 7868. The statute sensibly provides that declar-

ations by an agent such as the driver was in this case, the sole, acting representative of the plaintiff's case, though not made under oath, are sufficiently protected by the motive of the driver to protect himself, and if the admission is against interest, manifestly it is only because of the compelling truth of the facts. Indeed, with the exception of some cases not quite clear, and when confusion is removed, it is doubtful whether such evidence is not admissible at common law. At any rate the statute was conclusive.

The above theory was clearly advanced to the court, but the proof was denied (Tr. p. 133).

(C)

The testimony of the plaintiff's witness, Mrs. Charles Allison, was taken by deposition before United States Commissioner, who had no right, of course, to rule upon the competency of the testimony adduced. Indeed, the stipulation expressly provided that objections should be made and ruled upon by the court (Tr. p. 200). When this deposition was taken the witness was asked in part in regard to conversations she had with Mrs. Ennis after the accident as to how it happened. Thereupon the defendant cross-examined the witness in this regard, and also sounded her recollection, the result of which was that she testified that in those conversations as to how the accident happened Mrs. Ennis made no complaint about the driver or any reference

showing his having used intoxicating liquor (Tr. p. 102-103).

Now, the court, on being called upon to rule, excluded the direct examination, but required this cross-examination to remain in the case over defendant's objection. The direct examination as to conversations having been stricken, the cross-examination in reference thereto went with it.

B. & O. R. Co. v. Dever, 75 Atl. 352 at 356.
Bertenshaw v. Laney, 94 Pac. 805 at 806.

McCutcheon v. Jackson, 40 S. W. 177.

Bentley v. Bentley's Estate, 101 N. W. 976.

Achilles v. Achilles, 28 N. E. 45 at 46.

Callison v. Smith, 20 Kas. 28.

Miscellaneous other rulings on evidence have been set forth in the outline as to the misconduct of the court.

(E)

MISCONDUCT OF THE COURT.

The conduct of the court at the trial has been reviewed necessarily we think at length. Indeed, it is this necessary review which has made this brief altogether too long. We complained of this conduct. We think the opinion filed illustrates and gives color to the cold, printed transcript. There are some portions of the opinion which we think no one would attempt to answer. We prefer merely to forget them, and in the preparation of this brief we have forgotten them.

No matter what the court may say or do, there is this difference between counsel and

the court. A finding of misconduct or a reflection upon counsel hits but a single individual, but a finding of misconduct or reflection against a judge is not, and cannot be merely personal to him. Counsel, therefore, in presenting such a charge, is required, we think, to bear in mind that a criticism against a particular judge, is a criticism going beyond him to the court itself. For this reason, we have endeavored in every instance, in presenting our contentions, to show the respect for the court which we have, and in characterizing the action of the court it will be noted that we have qualified our assertions by stating that they are our opinions as to what transpired, and when actions seemed particularly incomprehensible, we have endeavored to present them respectfully, but we trust that these qualifications, inserted by way of respect for the court, in the difficult task of reviewing an even disagreeable experience, will not be taken as an indication of any lack of abundant confidence in the merits of the contention that the court's action was throughout prejudicial to the defendant.

The citation of authorities is not valuable here. Each case must be considered on its merits. The views of the courts are set forth in 38 Cyc, 1316-1325, where the vast array of authorities are set forth, most of which, be it said to the credit of the courts, are to the effect that the instances are rare where any single example of misconduct has been held prejudicial error.

We know the fearful burden we undertake to discharge when we present this matter by a cold printed transcript. Although the court, in its opinion, we think, sets us an example of departing from the record, we have held ourselves to the very record itself.

The case is readily distinguishable from others. We have here a complaint, not as to a single ruling, or as to a single example of misconduct, but as to the entire course of the trial involving comments upon the evidence, the witnesses and defendant's counsel, comments upon defenses interposed, undue harsh restrictions on the examination, the apparent forcing of useless objections on the plaintiff, and the sustaining thereof to the embarrassment of the defendant, all of which, when finally respectfully challenged before the court and jury at the conclusion of the trial, is met by no correction of the court or indication to the jury that counsel has misunderstood the court. On the contrary, in the jury's presence, the court rather confirms them in the impressions which they had probably gained, and says in substance that if the court's actions have affected the jury, we are at liberty to attempt to make the most of it.

In nearly all cases the error of the court, if any, in such matters involves a single thoughtless remark made by the court, which on its being called to his attention, is met by a frank review of his action and a statement to the jury that counsel has misunderstood. Generally this

will cure most errors. We think it would scarcely cure (though it might have helped with the jury) the conduct here complained of, because a court cannot be hostile to a party throughout a trial and then later correct itself at the end.

We would call the court's attention to one very recent case where it has been held that a single unfortunate remark of the court may so poison the mind of the jury that even when corrected by the court the damage done is not repaired. *Quirk vs. Consumers Co.*, 149 N. U.

(F)

DAMAGES.

All of the testimony on damages will be found on pages 61-62, 69-71, 77-78, and 80 of the transcript. It shows that the plaintiff necessarily spent more money in proper provision for his wife than the money loss sustained. Money loss and pecuniary loss are not entirely synonymous, but under the evidence the verdict is, as a matter of law, not merely excessive and indicating passion and prejudice, or a mistaken judgment on the part of the jury which could not be reviewed on appeal from the judgment; it is without evidence to support it and the judgment must therefore be reversed. The following authorities will show the views of the courts as to the measure of damages which cannot be sustained in these cases:

\$3000 Long v. Union Rd. Co., 107 N. Y. S. 401.

\$2500 Bond v. Atkinson, 9 Ohio Cir. Dec. 185.

- \$7000 Nelson v. Lake Shore Elec. R. C., 104 Mich. 582, 62 N. W. 993.
\$5000 May v. West Jersey S. Ry. Co., 62 N. J. Law. 63; 42 Atl. 163.
\$8000 Sherman v. West Stage Co., 24 Ia. 515.
\$4000 Chicago Elec. R. Co. v. Goebel, 129 Ill. App. 152.
\$5000 Glenn v. N. Y. C., 28 N. Y. S. 861.
\$3500 McIntyre v. N. Y. C., 47 Barb. 513.
\$10,000 Smith v. Lehigh Valley R. Co., 69 N. Y. S. 1112.
\$3500 Oakes v. Me. Central, 95 Me. 103, 49 Atl. 418.
\$3000 Ronson v. C. P. R., 18 Ont. Law. Rep. 337.
\$1500 York v. Can, Atl. Steamship Co., 22 Can, Sup. Ct. 167.
\$4000 Mitchell v. N. Y. C., 2 Hun. 535; 64 N. Y. 655.

Since the trial the plaintiff remarried, but the court ruled that this could not be considered as affecting damages. The weight of authority supports this view, but the ordinary lay judgment and the legislative declarations in compensation laws, including the Montana Workmen's Compensation Law, support the authorities to the effect that remarriage may be considered by the jury.

The Sagenaw, 139 Fed. 906 at p. 915.
Ry. Co. v. Kuehn, 8 W. 484 at 485.

The size of the verdict may also be considered in connection with the argument in reference to the effect of the misconduct of the Court.

Respectfully submitted,

VEAZEY & VEAZEY,

Attorneys for Plaintiff in Error.

No. 2598

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY,
Plaintiff in Error,

vs.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

R. O. LUNKE,
WALSH, NOLAN & SCALLON,
Attorneys for Defendants in Error.

Filed

OCT 20 1915

F. D. Monckton,
Clerk.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY,
Plaintiff in Error,

vs.

HERBERT L. ENNIS and GUY W. ENNIS,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

We will discuss the various propositions presented under the headings as they appear in the brief of plaintiff in error.

GENERAL OUTLINE.

On the 18th day of April, 1909, Nettie Ennis, the wife of Herbert L. Ennis and the mother of Guy W. Ennis, the defendants in error, received injuries resulting in death caused by a runaway team, the horses being frightened by a carcass which the railway company placed and permitted to remain on its right of way in close proximity to a public roadway used as such by the public, and intended as such by the public authorities. It was alleged that the carcass, in the condition in which it was as to appearance and through the emission of odors, was a public nuisance.

In December, 1909, an action was instituted in Valley County. There was a transfer of same to the Federal Court. In the complaint, it was alleged that the road was a public highway, regularly used as such by the traveling public. Issues were framed and the case came to trial in 1911. During the trial, it was contended that a variance existed from the fact that the public authorities in laying out the road didn't observe the statutory requirements in so doing. Leave was granted to amend the complaint, so as to conform to the proof, and the plaintiff in error forced a continuance of the case. The court held that the plaintiff in error could not be forced to proceed with the trial on account of an amendment being made as suggested. (Tr. pp. 30-32).

When these proceedings took place, in the light of the court's ruling, as to a variance existing, the amendments which were suggested were suggested orally. A continuance of the case occurring, the amendments were not then made. An amended complaint containing those amendments was filed. (Tr. p. 2).

A motion to strike the amended complaint from the files followed. (Tr. pp. 36-40).

This motion was argued and overruled. (Tr. p. 41). A demurrer was then interposed to the amended complaint and sustained and a second amended complaint was filed. A motion to strike out certain parts of the second amended com-

plaint was filed. (Tr. p. 45). This motion was denied.

A general demurrer was then interposed to the second amended complaint, which was overruled. (Tr. p. 15). An answer was then filed (Tr. p. 16) and through the filing of a reply the case was again at issue in February, 1913. (Tr. p. 21).

It is alleged that error has been committed on account of these amended complaints being filed, because, as is asserted, the defendants in error were permitted to repudiate the election, which it is claimed, they made. The defendants in error, in the first place, alleged that this was a public highway. Upon the trial they acceded to the ruling that upon the evidence a fatal variance existed. This was unfortunate. Experience has taught them to their cost that it would have been a good deal better if they submitted to the non-suit and corrected the error by appeal. In this way they would have been relieved of the embarrassment that they experienced in getting the case at issue, and they would have succeeded in disposing of the case much quicker than they have been able to do.

The learned trial judge while holding that a fatal variance existed, declared that on the facts developed, establishing a user of the crossing by invitation, the measure of duty on the part of the railroad company was the same as if the roadway was a public highway. Notwithstanding this, the trial was arrested in its progress and an amended

complaint was filed. In the amended complaint, the allegation was:

“That on the 18th day of April, 1909, and for more than four years prior thereto, there crossed said railway and right of way at a certain point thereof so under the jurisdiction of the said John Hamilton, as aforesaid, a roadway recognized as such by the defendants and used by the traveling public as a public roadway, which said roadway after crossing said railway and right of way ran to the town of Bainville and to points beyond; that with such roadway so used as aforesaid, the defendants recognized the public use of same and for more than four years next preceding the 18th day of April, 1909, defendants, for the accommodation of the public so using said roadway as it crossed said right of way constructed and maintained a plank crossing where the said roadway crossed its tracks and erected and maintained at said crossing a railway warning signal to the travelling public using said roadway and constructed and maintained at said point cattle guards and fences, such as are maintained where public highways cross railroad tracks and for more than four years next preceding the 18th day of April, 1909, the said defendants treated said roadway as if it were a public highway and during all of said time the defendants knew that the said roadway so crossing its said track and right of way was used by the travelling public and was so used without objection and with the tacit consent of the said defendant company.

Plaintiff further avers that for more than three years preceding the 18th day of April, 1909, the County Commissioners of Valley County, assuming that said roadway was a public highway, expended public money in

its maintenance and repair, so that said roadway would be fit and suitable for public travel, which fact the defendants well knew, or in the exercise of reasonable diligence should have known.”

(Tr. p. 3.)

These facts are summarized in the transcript at page 29 as follows:

“That at the trial of said cause plaintiff sought to introduce evidence that for more than four years prior to the 18th day of April, 1909, there crossed said railway and right of way a roadway used by the travelling public; that said use of said roadway was known during said times to the defendant railway company, and that, during said period the said defendant for the accommodation of the public so using said roadway as it crossed the right of way of said defendant, constructed and maintained a plank crossing where said roadway crossed its tracks and erected and maintained at said crossing a railway warning signal to the travelling public using said roadway, and constructed and maintained at said point, cattle guards and fences such as are maintained where public highways cross railroad tracks, and that during all of said time, the defendant railway company knew that the said roadway, so crossing the said track and right of way was used by the travelling public and was so used without objection and with the tacit consent of the said defendant company.”

The amended complaint was filed pursuant to the leave which was granted, and it might be remarked in passing that the amended complaint conformed in every particular to the requirements of the leave which was granted. When the

amended complaint was filed, a motion was interposed to strike out portions of same. As the motion covers several pages of the transcript (36-40), we deem it needless to insert it here, from the fact that a second amended complaint was filed.

A second amended complaint was filed. The allegations of the second amended complaint as to the roadway are as follows:

“III.

That on or about the year 1906, the county commissioners of Valley County, on proceedings taken for that purpose, undertook to lay out a public highway in said county, for use by the travelling public, and in said year took such steps in relation thereto that a certain roadway was laid out and established by said county commissioners, which said roadway crossed said railway right of way of the defendant company at a certain point thereof, the same being the point heretofore referred to as under the jurisdiction and supervision of the defendant John Hamilton. Plaintiffs further aver that in connection with the laying out and establishing of said roadway, as aforesaid, and in connection with the proceedings so had, as aforesaid, by the said county commissioner, the defendant company granted to said Valley County, for use over its said right of way, a right of way for said roadway, which said right of way, so granted by said defendant company for such roadway, as it crossed the right of way and track of the defendant company, was approximately about sixty feet wide.

IV.

Plaintiffs further aver that the said roadway so attempted to be laid out, as a public

highway as aforesaid was in said year opened for travel and public use, and so open for travel and public use, crossed the right of way and tracks of the defendant company, as and tracks of the defendant company, as aforesaid, and so opened and used extended to the town of Bainville, in said Valley County, where a postoffice was maintained, and to points beyond, and since said roadway was so opened for travel, in said year, said roadway has been used at all times since then as if it were a public highway by the travelling public.

V.

Plaintiffs further aver that ever since said roadway was laid out and opened, as aforesaid, the county commissioners of Valley County have treated it as if it were a public highway and have expended money in its opening, maintenance and repair.

VI.

Plaintiffs further aver that after said roadway was laid out and opened, as aforesaid, and after said defendant company granted a right of way for same across its said premises, as aforesaid, the defendant company placed and maintained across its tracks a plank crossing for use by the public travelling on said roadway, and ever since said roadway was opened, as aforesaid, the defendant company has placed and maintained, where said roadway crossed its rights of way, a warning signal that a public crossing existed there and has installed and maintained fences and cattle-guards bordering said roadway, as the same passes over its said right of way, and has in all respects, since the year 1906, treated said roadway as established across its right of way as if it were a regularly laid out public highway.

VII.

Plaitiffs further aver that the said defendant company, when the said roadway was laid out and opened, as aforesaid, dedicated for public use, an easement for roadway purposes in the ground covered by said roadway, as it crossed its said right of way, and for more than six years last past, the defendant company has invited all persons using said roadway, to use that portion of same crossing its right of way, and at all of said times, and now, the defendant company knew that the travelling public used said roadway as it crossed its said premises, and knew that the said roadway was so used by them as if it were a public highway, and this use was enjoyed by the travelling public with the knowledge and consent and permission of the defendant company.”

To the second amended complaint a motion to strike out parts of same was directed. This motion likewise is rather prolix, and for that reason, we omit inserting it here. (Tr. pp. 45-46-47).

The motion was overruled. A general demurrer was then interposed and overruled and this court is advised through a bill of exceptions how much in error the learned trial court was in refusing to sustain this motion and demurrer. (Tr. p. 53).

We quote from the transcript as follows:

“Thereupon the Court denied said motion to strike upon the ground that said amended complaint did not intend to allege, and did not allege, that the place of said accident (being the roadway in question) was a public highway, but only a roadway used by the public by the defendant company’s license, acquiescence, permission or invitation. There-

upon this defendant demurred to said amended complaint and said demurrer was, by the Court, sustained, and now by said second amended complaint filed by the plaintiffs herein, and by the several portions thereof hereby severally sought to be stricken therefrom, the plaintiffs again seek to charge and again seek to litigate that the crossing in question was a public highway by being regularly laid out, as such, by dedication and by estoppel and in other ways known to the law, and again allege and seek to litigate the question as to whether or not the said crossing referred to in said second amended complaint, and in the prior pleadings herein, was a public highway. By said action on the part of the plaintiffs hereinbefore recited, however, and by electing at said trial not to stand upon said ruling of the Court, and by electing not to let said cause go to final judgment upon said ruling of the Court, and by electing not to have the said ruling of the Court reviewed, and by electing to abide by said ruling of the Court and to conform thereto and by applying to said Court for leave to amend said complaint by striking out and abandoning the averments that said roadway in question was a public highway, and by applying to the Court for leave to amend said complaint by setting forth that said roadway was not a public highway, but a roadway used by the travelling public by the license, acquiescence, permission or invitation of said defendant company, the plaintiffs have conclusively elected that their remedy is not to allege, or seek to prove, that said accident referred to in said second amended complaint, and in said prior pleadings hereunder, occurred upon a public highway, or that the crossing in question was a public highway, and they have conclusively elected to abandon the theory that this action

is based upon an alleged violation of duties said to have been owing by the defendant to persons upon a public highway, and by the facts aforesaid the plaintiffs have conclusively elected to proceed upon the theory that the roadway in question was a private roadway used by the travelling public by the license, acquiescence, permission and invitation of this defendant company, and not otherwise."

Perhaps, with unnecessary detail we have at the outset set forth the foregoing facts. We have done so, however, studiously and purposely. We desire by this silent record to show to the court how critical the distinguished gentleman is who represents the plaintiff in error. A correct appreciation of his talents in this direction will be helpful when his brief is examined or at least that portion of it where he applies the broadsword to the learned trial judge for alleged misconduct.

It is needless to say that the amendments which meet the objection of the able counsel are proper.

In the case of *Wabash Railroad Co. v. Hays*, 234 U. S. 86, we have an instance of how liberal the rule is as to amendments. In that case an effort was made to recover under the Federal Liability Law. The proof showed that the indispensable element of interstate commerce was lacking. An amendment was allowed to conform to the proof, and a recovery was had under the state law. On this state of facts, the court said:

"Instead of presenting his case in an alternative way, the plaintiff so stated it as to indicate that he was claiming only under the

Federal Act, and when the proofs demonstrated that the injury arose outside of interstate commerce, and therefore that no recovery could be had under the Federal Act, the court was confronted with the question whether the declaration could be amended or regarded as amended to conform to the proofs. Holding that this could be done the court treated the mistaken allegation that the injury occurred in interstate commerce as eliminated. Therein the court merely gave effect to a rule of local practice, the application of which was not in any wise in contravention of the Federal Act."

The rule as to amendments in Montana as stated by the Supreme Court of that state, is as follows:

"The rule observed by this court has always been to allow them with great liberality where they do not change the nature of the action or mislead the adversary party to his prejudice; its application going even to the extent of permitting them after verdict and judgment."

Leggatt v. Palmer, 39 Mont. 302.

It is likewise insisted that in some manner the doctrine of election should be invoked to the undoing of the defendants in error. We respectfully insist that this doctrine has no application to the facts in the case.

O'Mara v. McDermott, 43 Mont. 198.

In the case of

Agar v. Winslow, 123 Cal. 587,

the court said:

"If the plaintiff was mistaken and undertook to avail himself of a remedy that he was never entitled to, this does not prevent him

from subsequently availing himself of a remedy that he is entitled to under the facts of the case. * * * No case has been called to my attention, nor do I believe that any can be found which holds that a person is estopped from pursuing a remedy that he is entitled to because he has endeavored to avail himself of another remedy that he never was entitled to. If this were the rule then a mere mistake of judgment would result in depriving one of valuable rights."

And so the defendants in error say that because in their first complaint they alleged that this was a public highway and because of non-compliance with statutory requirements the trial court held upon a showing made by them that it was treated in all respects by the public authorities and by the railway company as if it was a public highway and was used by the public that a fatal variance existed, they should be permitted to amend their complaint, so as to set up those facts and maintain their action, if on those facts an action could be maintained.

MISCONDUCT OF COURT.

Before taking up in detail the acts of misconduct so exhaustively treated in the brief of appellant, we might, by way of preface quote the following from Vol. 17, American & English Encyclopedia of Law, 2nd ed. page 721:

"A judge presiding at a trial is not a mere moderator between contending parties, but has active duties to perform in maintaining justice and in seeing that the truth is developed."

The power and authority which may be exercised by a judge in the trial of cases under different headings is treated in extenso in 38 Cyc., pages 1316 et seq.

It will be admitted by opposing counsel, we believe, that the record of this case by reason of the inefficiency of the stenographer who reported the trial is not correct in every detail. The learned trial judge so noted this in the following language:

“After hearing defendant’s argument on motion for a new trial made immediately after the above certificate signed, and discovering the chief ground relied upon, the court examined the bill and finds it defective, incomplete and unsatisfactory. It has corrected it in several particulars, pages, 61, 69, 70, 88, 93, 94, 95, 110, but the instructions especially are subject to the above criticism, though doubtless not to be remedied. The court knows the great difficulty the stenographer has in noting the court’s remarks, and the greater, transcribing them. The court’s earlier certificate is to be read herewith.”

(Tr. p. 238.)

We ask no forbearance, however, on this score,

We advert to the fact as explanatory of the existence of many foolish, absurd and obvious errors. Dependence was placed on the stenographer, so that notes of the testimony generally made by counsel were not made, and the transcription of the testimony and of the proceedings was so grossly inaccurate that even with the corrections made, palpable inaccuracies still abound.

The learned counsel for appellants says that when the defense of contributory negligence was touched, the court suddenly, to use a street colloquialism, "flew off the handle," or to borrow the language of the brief, "It was at this time that the court *suddenly* and without reason or excuse lost control, and first started on its course of hostility to the defendant, and from the time of this sudden and abrupt beginning defendant, even in its three respectful and earnest pleadings with the court was not able thereafter to restore the judicial equilibrium." (Brief p. 9).

The alleged drunkenness of the driver was the cause of the upheaval. The court's action in the premises, so it is alleged, was all the more appalling, as the answer set forth two separate defenses "separately stated and conspicuously numbered." These defenses and the manner of their presentation can best be understood by setting them forth for perusal here:

"For its second separate answer to said second amended complaint, this answering defendant says that, if this answering defendant was in any respect negligent in any of the matters stated in the second amended complaint herein, then and in that event plaintiff's damage, if any, was due to, and caused by, their own contributing fault and carelessness, and to the contributing fault and carelessness of said Nettie Ennis, their and her agents, servants, and employees; and to the failure on the part of the plaintiffs and on the part of said Nettie Ennis, their and her agents, servants and employees, and each of them,

to exercise such reasonable care and caution for the safety of said Nettie Ennis, as would, could and should, and ordinarily would, have been exercised by the average reasonably prudent person, under all the circumstances then and there existing, at all times and places stated in the complaint; and to the fact that the said Nettie Ennis and the said John Bigelow so negligently drove the said team of horses that the same ran away and escaped from their control. Further answering, this answering defendant says, that, if the matters of fact stated in said second amended complaint are true, then and in that event, in the exercise of such reasonable care and caution as the average reasonably prudent person, under all the circumstances then and there existing, would, could, and should, and ordinarily would, have exercised, the plaintiffs, the said Nettie Ennis, their and her agents, servants and employees and the said John Bigelow would have known—and, in fact, actually did know—the facts stated in said second amended complaint, if the same were or are true and they, and each of them, had the last clear chance to avoid the alleged negligence of this answering defendant and the damages, if any, resulting therefrom, and to avoid the said runaway and by the exercise of such reasonable care and caution aforesaid, as the average reasonably prudent person, under all the circumstances, would, could, and should, and ordinarily would, have exercised, they, and each of them, could, should, and would, and ordinarily would, have discovered and avoided the alleged negligence, if any, of this answering defendant, and the alleged dangers alleged in the complaint.”

Even though this answer was read in the hear-

ing of the court, the court's attention might excusably be directed to the "make up" of the pleading, so that the drunkenness of the driver might be overlooked, veiled as it was under language so ex-cruciatingly particular and at the same time so vague and indefinite as follows:

"That if this answering defendant was in any respect negligent in any of the matters stated in the second amended complaint herein then and in that event plaintiff's damage, if any, was due to and caused by their own contributing fault and carelessness, and to the contributing fault and carelessness of said Nettie Ennis, their and her agents, servants, and employees; and to the failure on the part of the plaintiffs and on the part of said Nettie Ennis, their and her agents, servants, and employees, and each of them, to exercise such reasonable care and caution, for the safety of said Nettie Ennis, as would, could and should, and ordinarily would, have been exercised by the average reasonably prudent person, under all the circumstances then and there existing, at all times and places stated in the complaint;"

Or the court's attention might have been directed to the inquiry as to whether such a pleading with hypothetical and conditional averments would be sufficient should an objection be interposed to the presentation of proof under it. Objection was not then made to the pleading, but now upon a more careful analysis of its contents we feel disposed to urge upon the favorable consideration of this court that this answer is fatally defective.

National Council Knights Ladies of Security vs. Owen, 149 Pac. 231.

At any rate, we insist that under its indefinite averments, the drunkenness of the driver would not be a proper subject of inquiry.

The Supreme Court of Montana, in the case of Gleason v. Mo. River Power Co. et al, 42 Mont. 243 states the rule as follows:

“It has long been settled law in this state that the presence of contributory negligence is a matter of affirmative defense. (*Schroeder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619.) This being so, it follows that contributory negligence should be pleaded with the same degree of particularity as is required of the plaintiff in pleading negligence on the part of the defendant. The manner of doing so was discussed at length by this court in the case of *Pullen v. City of Butte*, 38 Mont. 194, 99 Pac. 290, 21 L. R. A., n. s., 42. (See Phillips on Code Pleading, sec. 503.)”

We are inclined to think that should some person have occasion to bring an action against Nettie Ennis and John Bigelow on account of being injured by this runaway that some little difficulty would be experienced in showing that the driver was drunk, and that his drunkenness was the cause of the runaway, on the allegation that they “didn’t exercise reasonable care and caution as would, could and should, and ordinarily would be exercised by the average reasonably prudent person under all the circumstances then and there existing at all times and places stated in the complaint, and that they negligently drove the team,

so that they escaped from their control.” In justice to the learned trial judge, it might be stated that even though this defense is “conspicuously numbered,” he might be pardoned for inquiring as to whether the drunkenness of the driver was pleaded. This, however, is neither here nor there. We will return to the “sudden loss of control,” referred to when the learned counsel tried to “restore the judicial equilibrium.” The brief of appellant refers to the transcript at pages 152, 158, 194, 198 as the places where the efforts of the learned counsel to restore the “judicial equilibrium” proved unavailing. This court by confining its inspection to the pages referred to will glean little to enable it to reach a satisfactory conclusion as to whether at that particular time the learned trial judge was out of balance or not. It is only by considering the antecedent happenings that this can be done, and so that the court may be fully advised in the premises, we set forth fully what the transcript discloses in each case.

INSTANCE NO. ONE.

Mr. Hubener was on the stand. He testified that Mr. Bigelow had brought Mrs. Ennis to his place out in the country on the afternoon of the day of the accident. (Tr. p. 140). This place was witness’ farm, which was about one and one-half miles distant from Bainville. (Tr. p. 140).

“Q. Did you drive back to Bainville with Bigelow?

A. Well, I ain’t sure whether I drove back

with him or not, but I was in town and drove in town that afternoon with Mr. Bigelow. He was in town during the time that Mrs. Ennis was at the farm visiting my wife, and perhaps making other calls down around there.

Q. Did you see yourself where he went?

A. Well, I was naturally meeting him around my place.

By Col. Nolan: We object to that "naturally."

By the Court: Of course, the purpose of this is to show the condition of the man at the time he left town. It would not be admissible to show that. That would not be allowable as a part of the case of the defendant. Intoxication is not pleaded as a defense. The objection is sustained to this question. I don't see that that is an issue in this case.

To which ruling of the Court the defendant, by its counsel then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Did you see him shortly before he left on the return trip to the Ennis ranch?

A. Yes, sir.

Q. What was his condition at that time relative to sobriety or intoxication?

By Col. Nolan: We object to that as incompetent, that being no issue in the case. The affirmative defense set up here in the in the answer has to do with a defense entirely independent of the condition of the driver on the day of the accident.

By Mr. Veazey: Contributory negligence is expressly pleaded in the answer. The answer charges that the driver so negligently drove the team that the accident happened. That is clearly sufficient to authorize the introduction of evidence as to intoxication. Pleading the fact of intoxication would be

pleading evidence. If you allege that an engineer so negligently drove his engine that a collision occurred, clearly intoxication of the engineer could be proved by the allegation.

By the Court: The objection will be sustained. There is no issue made as to the intoxication of the driver.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

By Mr. Veazey: If your honor please, I have offers of proof which I imagine will take more than the time between now and twelve o'clock in order to write them out, the time when the recess is taken, and I should like to have an opportunity to prepare them.

By the Court: Very well." (Tr. p. 140).

Seemingly, during the recess, the court considered more fully the proposition as to whether under the plea of contributory negligence as pleaded, the intoxication of the driver would be admissible, and concluded that it would. The record discloses the following:

By the Court: I suppose you are proceeding to an offer of proof of the condition of the driver at that time.

By Mr. Veazey: In Bainville that morning.

By the Court: When did this accident take place?

By Mr. Veazey: It took place in the afternoon.

By the Court: There is a plea of contributory negligence on the part of the driver. Of course, it would be imputed to the plaintiffs if he was negligent with his driving. Now, I think if you can show his condition at the

time, as distinguished from previous habits, that you will be permitted to show that—his condition at the time, not previous habits. His condition at the time, or so near that it would be reasonable to infer that it would continue to the time of the accident, and that it was a condition that would affect his driving, that, I think, would be proper to be shown.

★ ★ ★

(Witness continuing):

I couldn't tell you the time that Bigelow left on his return to the Ennis ranch, but I should judge it was maybe three or four o'clock, somewhere in there. It was about the middle of the afternoon. I saw him that afternoon before he returned to the ranch.

Q. What was his condition at that time in reference to sobriety or intoxication?

A. I could not tell you exactly what condition he was in. He was in my place of business.

Q. Tell us his condition and how you came to observe it, and all the facts bearing on his condition. Just go ahead and tell us.

A. Well, I should judge that I know that Jack was taking a drink or two. I know he was in the——

Q. Tell what you saw—only what you saw.

A. I saw him take a drink or two. That is all I can state. He took one or two with me. As regards his condition, as to whether or not he was under the influence of liquor at all, he wasn't drunk. What I mean by drunk is that he wasn't staggering around. He apparently looked all right. As regards giving the jury the best picture I can as to his condition, it is quite a long time ago, but I know we were in there together. I met Jack

several times that afternoon and talked to him.

Q. Don't hesitate.

A. Well, he was in my place of business and we visited and naturally had a few drinks together. He also was down at Mr. Doyle's place. He was down in there. I don't know anything about that. During the time that Mrs. Ennis was down at my place, anyway during her absence, he was down at my place of business and on the street I met him several times and remember talking to him. I remember remarking to him as to the team.

Q. Well, now, in the language of the street—don't hesitate to use whatever language you desire to—such language that you would use on the street—what would be the expression of the street as regards his condition when you last saw him that day?

By Col. Nolan: We object to that as incompetent. He can tell us what his condition is.

By the Court: Yes, this man has been liquor dealing, and has seen men drunk. He can tell whether a man is under the influence of liquor or drunk, without being urged strongly. The objection is sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Q. Will you describe in your own words and in the words that you would use on the street what you considered was his condition when you last saw him in Bainville?

A. Well, as near as I can describe it, I would put it this way. He wasn't drunk, but feeling good. That is about as close as I could come to it.

Q. Well, didn't you describe it to me as just short of a good start for a spree?

A. Well, if he was feeling good, I suppose if he had stayed there, why, naturally, he would have wound up in a spree.

By the Court: You will have to explain to the jury where the man started from—his condition short of the start.

Q. Was that the expression that you used to me, that he was just short of a good start on a spree?

By Col. Nolan: We object to that as immaterial, what was said to counsel. We were not there to be able to keep track of it.

By the Court: Sustained.

By Mr. Veazey: I desire an exception.

By the Court: It will be noted.

By Mr. Veazey: I desire to offer to prove by the witness that in response to questions by us as to what was Bigelow's condition when the witness last saw him on the street on the day of the accident, that the witness described him to us as just short of a good start for a spree.

By the Court: Any objection?

By Col. Nolan: We object to that as incompetent, irrelevant and immaterial.

By the Court: It is very vague. I don't see that it would enlighten the jury any if he did see him at that stage, but he says that he did not see him drunk to the extent that he was staggering, and the witness states that he was feeling good, it looks to me about as far as this witness can go. The objection will be sustained.

To which ruling of the Court the defendant, by its counsel, then and there duly accepted; which said exception was thereupon duly noted and allowed. (Tr. pp. 142-147).

The cross-examination of the witness was taken up, and he was interrogated as to whether in a

conversation that he had with Mr. Ennis and others during the recess, he didn't say that he was mistaken when he said that Mr. Bigelow had been to the farm with Mrs. Ennis. (Tr. pp. 148 and 149).

Then he is re-examined, although it is marked "Re-cross Examination," evidently a mistake, as follows:

"As regards whether after the adjournment this noon the plaintiff sought to discuss with me my testimony, why Mr. Ennis met me out here in the hall and told me I was mistaken about Jack driving Mrs. Ennis out to my farm. Of course, I figured at the time I wasn't certain. I didn't say I was certain in my testimony and tried to refresh my memory on it, and I finally told him I thought he was right about it. I could get it from my wife, but I never thought of it when I came up here. She was out there and I remember meeting her, but whether I met her the first day at the farm or in town, I couldn't remember. Jack was out at the farm, and I think she was. Certainly I was perfectly free in giving my information to Mr. Ennis.

Q. You didn't hold back anything?

By Col. Nolan: I object to that as irrelevant and immaterial and not proper re-direct examination.

By the Court: Objection sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: I desire to prove that this witness talked voluntarily and freely at the instance of Dr. Ennis in the talk that took

place during the noon intermission in regard to all the facts in the case.

By Col. Nolan: We object to that as incompetent, irrelevant and immaterial.

By the Court: The objection is sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. In view of your statement on direct examination and the statement now made to Dr. Ennis in regard to the sobriety or intoxication of Mr. Bigelow, would you turn to the jury and tell them what you know as regards his condition. Give them your best judgment of his condition at any time on the 18th day of April at Bainville.

By Col. Nolan: We object to that as not redirect examination, as repetition of the testimony already given.

By the Court: Objection sustained.

To which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: If the court please, here is an instance where in justice to the witness it is only proper—

By the Court: No, I don't care about hearing anything. The court has ruled.

Exception taken by the defendant.

Q. I may be incorrect in understanding your testimony, Mr. Hubener. I understood you to say that your judgment was that though he was not drunk he was under the influence of liquor while at Bainville that day shortly before starting, and I understand that you stated to Dr. Ennis that you cannot state whether he was drunk. Will you enlarge on that?

By Col. Nolan? We object to that. I don't think it is right to have a question of that kind put in the light of the testimony of this witness.

By Mr. Veazey: If I might interpose at this time—if the jury doesn't want any enlightenment on that, I want some enlightenment. Here is a statement which I am sure I misunderstood, and I think counsel has misunderstood it.

By the Court: I think not. All this witness' testimony was very straight, both before on the direct examination and on the cross-examination. I don't think the jury is in any doubt about it. The objection is sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Do you recognize, Mr. Hubener, that there is any inconsistency in your testimony on direct examination and in your testimony as to your conversation with Dr. Ennis?

By Col. Nolan: We object to that as incompetent, irrelevant and immaterial.

By the Court: It will be for the jury to say. The objection is sustained.

Exception taken and noted by the defendant.

By Mr. Veazey: We offer to endeavor to get from the witness an explanation as to any possible inconsistency in his testimony, as regards the condition of the witness Bigelow and his alleged declaration to Dr. Ennis.

By Col. Nolan: We object to the offer as improper, irrelevant and immaterial.

By the Court: Objection sustained.

To which ruling of the court the defendant by its counsel then and there duly excepted,

which said exception was thereupon duly noted and allowed.”

(Tr. pp. 150-153).

INSTANCE No. TWO.

Mr. Provost is on the stand. He is a witness for the defendant. He testified as follows:

“I had seen the Ennis horses before the runaway occurred on the 18th of April. To my knowledge I would call them a high-strung team. No, sir, as to whether I would give any other designation of them, no sir, I don't know anything about them.

Q. What would you say as regards the skill, if there would be any, necessary to handle them?

By Col. Nolan: We object to that as incompetent, irrelevant and immaterial.

By the Court: Objection sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Would you say that those horses could be described as kittens?

A. I shouldn't think so.

By Col. Nolan: We object to that. I don't think that is competent or material.

By the Court: I hardly think so. Objection sustained.

To which ruling of the court defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: We offer to prove that in his opinion they would not be horses that could be described as kittens as gentle horses.

By Col. Nolan: I object to that as incompetent and immaterial.

By the Court: He may describe what he knows of them. He has already said in his opinion they appeared to him a high-strung team. The objection is sustained.

To which ruling of the court defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Can you give us any other description of the horses other than they were a high-strung team?

A. No, sir.

Q. Would you call them bronchos?

By Col. Nolan: To that we object as leading.

By the Court: The objection is sustained.

By Mr. Veazey: Where counsel asks questions and endeavors to get the facts and the witness, for one reason or another, perhaps because of the glamour of the court room, or what not, is not able to respond readily—

By the Court: I don't care to hear an argument. The court has ruled.

By Mr. Veazey: In the interests of the defendant, I feel called upon to state to the court—

By the Court: When the court wants any argument from you and instructions on the law, he will ask for it, and until that time comes you will refrain.

By Mr. Veazey: I beg your honor's pardon, but desire an exception to the remarks of the court.

By the Court: It may be noted, which said exception was thereupon duly noted and allowed.

Q. Did you describe those horses to me, Mr. Provost—

By Mr. Veazey: If the court please, I have got to give this question in this way.

Q. Did you describe those horses as bronchos, rather wild and hard to handle.

A. I did.

By Col. Nolan: We object to that as hearsay and leading, and even if they are so described, that is immaterial. The only evidence competent would be as to their runaway disposition.

By the Court: The question is a leading one. If the witness has made any statements here contradictory of any statements he had made elsewhere, this would be a permissible question, in order to refresh his memory, or if surprise is claimed. Otherwise not.

The objection is sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: We offer to prove that the witness did today describe the horses as bronchos rather wild and hard to handle. In this connection we offer to prove that the leading of the witness is more or less necessary and has not been undertaken by counsel until it was found necessary to do so.

By Col. Nolan: I object to that as immaterial and irrelevant.

By the Court: Objection sustained.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed."

(Tr. pp. 157-160).

In passing, we might parenthetically remark, as revealed by the foregoing testimony that the distinguished gentleman at that particular stage of the proceedings stood more in need of a sedative than did the trial judge. The foregoing

shows that the witness had testified that the horses were bronchos, were high-strung and were not kittens, and that he had told the learned counsel so. All of this was with the jury, and yet the offer of proof excluded contained those facts and nothing more.

INSTANCE NO. THREE.

Mr. Hamilton was on the stand and examined by Mr. Veazey and testified as follows:

“In that work of prospecting for gravel in going to and from my work, I went by this crossing lots of times. I would be out on a trip prospecting for gravel ten hours a day. Ten hours’ work was my day. I would be out prospecting for gravel, possibly, eight or ten hours a day. I would be out just about eight hours, is what I mean. Then I would come home every day. As regards what opportunity I had to observe this crossing from the time the carcass was there until the time of the accident, well, I was prospecting for gravel in all directions around Bainville there: I passed that railroad crossing there, we will say about three or four times a week. I don’t remember exactly about this—about how many times in the week, and the carcass of a horse was burned there. The carcass was burned three times. The first time it was not a very good job on that carcass and then the section foreman that was in charge of the section at the time started up another fire and burned it. But still there was something left after that and the Central Security had a lot of hound dogs, you call them, and I see the dogs there eating the meat off. After I finished my search for gravel, I had charge of the same section. As regards my opportunity

in the course of my work in charge of that section after I had finished searching for gravel to observe that crossing, well, my duty was to go over the section every morning and go over the section regularly. I would return every day, but sometimes it was late in the evening about five o'clock. My section extended from Lakeside on the east to the west end of the Bainville yard.

Q. So your section extended from the west end of the Bainville yard easterly?

By the Court: You needn't go into details. If the plaintiff wants to examine him he can. All his duties would cover too much ground for this particular purpose.

Q. How would you go over your section?

A. About twice a day. We start out from Bainville at seven a. m. on a hand-car operated by hand. As regards whether in approaching this crossing, there would be anything that would control our movements over there and over that crossing as regards going fast or slow, we had to stop there and send a man ahead there on account of a short curve and a cut to the east. I had to send a man ahead to look for trains.

Q. In your work as section foreman, what is your duty?

Col. Nolan: I don't care about this. I don't see any point to this.

By Mr. Veazey: I want to show his opportunity for observing the conditions there.

By the Court: Never mind. Bring it right down to the crossing, and if the transaction isn't specified with sufficient particularity that can be brought out on examination. Prove what he knows about the conditions at this crossing.

(Witness):

A. Yes, sir. I know the facts in regard to

the carcass and its condition. I never noticed any odor or smell from that carcass.

Q. Was there any fact right before the accident or do you recall any fact which would show your ability to observe whether or not there was any odor from the carcass?

By Col. Nolan: We object to that as being incompetent, immaterial and irrelevant and leading and suggestive.

By the Court: You have asked him in infinite detail now and what he saw there. He has said there was no odor. Now, I think that serves your purpose. Objection sustained.

To which ruling of the court, defendant by its counsel, then and there duly excepted, which said exception was thereupon duly noted and allowed.

Q. Did you ever stop there shortly before the accident?

A. Yes, sir.

Q. What did you stop there for.

By Col. Nolan: We object to that as immaterial.

By the Court: Objection sustained.

To which ruling of the court, defendant by its counsel then and there excepted, which said exception was thereupon duly noted and allowed.

By Mr. Veazey: We offer to prove by the witness now upon the stand that he often went back and forth there, before the accident and that he and his men took dinner on the right of way there on the crossing and observed no odor from the carcass.

By the Court: You can ask why he stopped there. Ask him how long he stopped there.

By Mr. Veazey: Is the offer of proof denied?

By the Court: Oh, yes.

To which ruling of the court defendant by its counsel then and there duly excepted,

which said exception was thereupon duly noted and allowed.

By Col. Nolan: Of course, I have no objection to his showing that he was there a week before and that he crossed there.

By the Court: The court has indicated that he may do so. There is a limit to these matters of detail.

Q. How long did you stop there on the occasion about a week before the accident, right near the carcass?

A. I stopped there during dinner time. I and my crew eating dinner there.

By the Court: You are asked how long you stopped there at that time.

A. An hour. I stopped right in the crossing there at the edge of the track.

Q. What direction did you give as regards the burning, as regards the fuel which should be used?

By Col. Nolan: We object to that as immaterial what direction he gave as to the fuel or what was done in that connection.

By the Court: Objection sustained.

To which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

A. No, sir, I did not set the fire myself.

Q. When you would look for gravel, what conveyance did you use then?

By Col. Nolan: We object to that as immaterial.

By Mr. Veazey: Will your honor trust me in this particular this time—how did you go?

By the Court: The trouble is you make it hard work. Your examination. Too much detail. This matter of his traveling and stopping there for dinner is not of consequence. It was enough for him to stop there that long

and to testify he had to demonstrate his opportunity for observation. It was enough for him to stop there that long and to say so, to show his opportunity for observation without detailing he stopped there for the purpose of eating his dinner or any other reason.

Q. How did you go over the country when you would go prospecting for gravel?

A. On a saddle horse.

Yes, sir, that saddle horse took me over that crossing. That carcass did not bother my saddle horse at all as I went over that crossing. At the time of this accident I had entered a homestead. I have a farm, yes sir." (Tr. pp. 189-194).

The other instance to which reference is made occurred at the close of the trial. It relates to an expressed intent on the part of counsel in case the jury returned a verdict in favor of the plaintiff that because counsel felt that the court ruled too frequently against him and because counsel was hampered in the examination of witnesses, and because the court's demeanor may have affected the jury, the court would be asked to review these matters on a motion for a new trial. (Tr. p. 198).

We have known of demonstrations of this character favorably influencing a jury. Such an idea could not remotely lurk in counsel's mind. Perish the thought.

MISCONDUCT OF THE COURT ON THE DEFENSE OF CONTRIBUTORY NEGLIGENCE.

Under this heading, counsel for plaintiff in error discusses the difficulties that he encountered in adducing evidence as to the drunkenness of the driver Bigelow. He complains because of the inquiry made by the court as to whether the plea of contributory negligence had been interposed.

On the cross-examination of Mr. Ennis, exhaustive in scope, counsel for plaintiff in error took up with the witness his knowledge of Mr. Bigelow, the driver. In his examination in chief he testified about Bigelow working for him for a period of six months doing general farm work, and that he was a thorough good horseman. (Tr. pp. 66-67).

Upon cross-examination he testified without interruption as follows:

“I had confidence in Bigelow, the driver, yes, sir. I knew he drank, yes, sir. As to whether I knew that he drank heavily, he never did when he worked for me. He was working for me about six months. I had known him probably a year prior to that. As to whether I knew that his general character may be described as a heavy drinking man, he was a man that drank occasionally.

By the Court: Have you any plea of contributory negligence in here?

By Mr. Veazey: Yes, sir.

By the Court: If you have no issue based on this I cannot see that it is competent and worth while going into.

By Mr. Veazey: There is an issue on intoxication of the driver in connection with the accident.

By the Court: Very well, proceed.

Q. Don't you know the instances yourself where Bigelow was drunk?

A. Yes, sir.

Q. Now, what instance do you know of in that connection? Tell it to the jury, will you?

A. Well, one time he went up there with a saddle horse to Bainville. I don't know

from my own knowledge that he was drunk then, though I would think he was.

By Col. Nolan: I object to that. The question is whether he knows whether he was under the influence of liquor at the time and whether it contributed to the injury complained of. This testimony is incompetent, irrelevant and immaterial.

By the Court: Yes, I will sustain the objection.

To which ruling of the court, defendant by its counsel, then and there duly excepted, which said exception was thereupon noted and allowed.

By Mr. Veazey: We offer to prove by this witness now on the stand that he knew that the driver Bigelow prior to the accident was a man given to the habitual use of intoxicating liquors to excess.

By Col. Nolan: I object to that unless it is shown in that connection that he was incapacitated at the time in question by drunkenness.

By Mr. Veazey: We disclaim any intention of proving by this witness that he was intoxicated at the time, but we offer this testimony to prove his habitual intoxication and to disprove the assertion of the witness that he had confidence in the driver Bigelow.

By the Court: I will sustain the objection. There is no issue framed on this as the court sees it, and it is improper cross-examination.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed."

(Tr. pp. 78-80).

What is there in this occurrence to justify the claim that there was an improper interference with the orderly proceedings of the trial? There

was nothing improper in making the inquiry as to whether this character of evidence was competent. It was the first time it was broached in the trial, and the record discloses that upon the court being advised that there was an issue of intoxication of the driver, counsel was permitted to present evidence as to intoxication. Counsel, however, desired to show a habit of intoxication and intoxication at other times. This, the court deemed incompetent, and in all of the varying moods of counsel, then and thereafter, as shown by this record, the court unalterably and consistently ruled that this evidence was incompetent.

Upon being advised, however, that intoxication was not specially pleaded, an objection to this evidence was sustained. (Tr. p. 141). It was then that the recess occurred, and upon the re-assembling of the court, the court inclining to the belief that the evidence was competent under the allegations of the answer, the fullest latitude was given to show the condition of the driver on the day of the accident. Surely, it cannot be claimed that an inquiry by the court when the matter of the intoxication of the driver was reached as to whether that was an issue, the pleading silent on the subject, except as it might be covertly disclosed by the general allegation "that the driver and Mrs. Ennis negligently drove the team," constituted an act of impropriety.

While it is true that the inquiry made by the court as shown by the record was whether there

was a plea of contributory negligence. Upon being advised that there was, the court then inquired "If you have no issue based on this, I do not see that it is competent and worth while going into." Based on what? Based on intoxication of the driver, of course, and the learned counsel so understood it.

"By Mr. Veazey: There is an issue of intoxication of the driver in connection with the accident.

By the Court: Very well, proceed." (Tr. p. 78).

Counsel then proceeded to interrogate the witness, not as to Bigelow's condition on the day of the runaway, but rather as to Bigelow's habits of intoxication, and this evidence the court at all times upon objection adjudged incompetent.

At any rate when the objection was made, the witness was testifying to facts of which he had no personal knowledge. (Tr. p. 79).

The court then being advised that intoxication of the driver was not expressly pleaded, ruled, upon objection, that the evidence was not competent, and the incident closed. (Tr. p. 80). During the noon recess the changed ruling was made, with directions to the learned counsel to present all the evidence he had as to Bigelow's condition on the day of the accident.

Counsel encountered no difficulty in presenting such evidence as he had on that score.

The learned counsel does not seem to differentiate between the rulings of the court as to the con-

dition of Bigelow as to intoxication on the day of the accident, and the rulings of the court as to habits of intoxication, or as to Bigelow drinking at other times. If there is anything that rings clear in the record from beginning to end it is that all evidence as to Bigelow's condition on the day of the runaway was competent, and that evidence as to habits of drinking was not. If this distinction is noted, the deductions on page ten of the brief are without justification.

We read as follows from appellant's brief, page eleven:

"Defendant thus had difficulty in getting this proof as to the condition of the driver into the case, but it appears that the plaintiff had no such difficulty, for, after voluntarily attempting to confine the plaintiff's proof to what the court considered were the issues, and after having ruled, without objection by the plaintiff, that there was no issue of contributory negligence, or of intoxication, we find that the plaintiff, without any interruption by the court, is allowed, through the witness, Mrs. Charles Allison, to testify that Bigelow, at the time of the accident, was perfectly sober." She was cross-examined on this. Again, Mrs. Katy Meinhardt was allowed to testify for the plaintiff that Bigelow 'was perfectly sober,' and that 'there was no sign that he had been drinking at all,' and she also was cross-examined on this."

In the testimony of Mrs. Allison, the following appears:

"As regards whether I noticed the condition of Mr. Bigelow at the time he came up to the house to get me on that day as to his being

sober or under the influence of liquor, he was perfectly sober as far as I could see.”

(Tr. p. 100).

And upon cross-examination counsel interrogated the witness as follows:

“Did Mrs. Ennis say anything to you at the time about his having had any liquor or anything like that?

A. No, she did not.

Q. Did she say anything after the accident about his having had any liquor?

A. No, sir.”

(Tr. p. 102).

And in the case of Mrs. Meinhardt, the following appears:

“As regards his condition that day, whether he was temperate or under the influence of liquor, he was perfectly sober.”

(Tr. p. 109).

And upon cross-examination, the witness said:

“When we came back we did not see any sign that he had had intoxicating liquor.”

(Tr. p. 110).

This witness accompanied Mrs. Ennis to the Hubener farm house and returned with her to Bainville when the team was turned over to Mr. Bigelow, when without further delay they started for home. (Tr. p. 110).

The testimony of these witnesses was given through deposition. There was no objection interposed to the testimony in chief. It is true that counsel sought to prevent the cross-examinations being read, urging in that behalf he had a right to do so. The court held against him. As to whether

he had such a right is discussed elsewhere in this brief. We submit in fairness that the excerpt from the brief *supra* is far-fetched—more than far-fetched—it is unwarranted.

A fault-finding disposition is in evidence because the court directed counsel to make an offer of proof in writing, as the rules of court required. (Brief page 12). Here the record gives evidence of incompleteness. (Tr. p. 136).

A question is put to the witness Gardner as to Bigelow's habits of intoxication. An objection is made and sustained and exception noted. (Tr. p. 138).

The record then shows the following:

“By Col. Nolan: If your honor will tell the jury where you exclude the evidence that they will not consider it.

By the Court: You may write your offer of proof, if you think it will do you any good. We will give you time. It is not admissible under the issues in this case.”

We do not believe that the learned counsel will say that this truly represents the facts. One would suppose from this narrative that Col. Nolan was directing as to what should be done. Mr. Veazey, we are satisfied, will not have the hardihood to say that such a thing would be possible, Judge Bourquin presiding.

The record as it appears, clearly shows that there is omitted matter. With the record in its present condition, there is nothing in the context which could elicit the statement from Col. Nolan,

and there is nothing in the context which would authorize the court's remarks. There was no offer of proof made, to which the court's remarks could have reference. The fact is that counsel for plaintiff in error advised the court upon the objection being sustained that he desired to make an offer of proof, and started in to do so, when the court stated that the rules required such offers to be in writing. Col. Nolan then made the statement probably in substance as the record shows. The court then suggested that the stenographer might be taken beyond the hearing of the jury and the offer of proof dictated to him. The stenographer was taken to a room adjoining the courtroom, and the offer of proof dictated, which in an abridged form is in substance the offer which appears in the record.

As we have heretofore stated, we disclaim any purpose to do other than abide by the record. Where, however, the record makes the actors seem ridiculous in justice to them, it is only fair and right that some explanation should be offered.

Considerable space is devoted in appellant's brief to analyzing this language of the court in directing that the offer should be in writing. (Brief pp. 15 and 16). In the first place, we dispute the correctness of the conclusions set forth. In the next place, if the language was susceptible of the construction now contended for, and if counsel was apprehensive that his case was preju-

diced thereby, it is passing strange that instant action was not taken, and the suggestion made to the court that the incident was one which should suffer correction at the hands of the court.

Counsel further comments as follows:

“On the offer of proof being made the plaintiff objects to the same on the ground that habit is too remote, and finally, and apparently more under compulsion induced by the court’s demeanor, reluctantly includes the court’s objection that the evidence was not admissible under the issues, which objection the court sustained.”

(Brief, p. 13).

If the foregoing is intended to apply to the writer, who made the objection, although, undoubtedly, somewhat different in form, all that he can say is “That he denies the soft impeachment.”

Counsel tells us in the trial of this case he acted at times under compulsion. This comment would lead one to believe that counsel for plaintiff in error imagines that respondent’s counsel likewise at times acted under compulsion. It may be the case of a man under the influence of liquor imagining that everybody with whom he comes into contact being equally so. If during this trial the writer acted under compulsion, he is not now aware of that fact. He thought, as undoubtedly most lawyers do, when the court ruled against him on propositions submitted, that the court was wrong. This and nothing more.

We insist that counsel for plaintiff in error ex-

perienced no difficulty in getting to the jury such evidence as the court deemed competent, as to the condition of the driver as to intoxication on the day of the accident. He did experience difficulty in getting to the jury evidence as to habits of intoxication. The record likewise discloses persistent and repeated efforts after the court's position was clearly defined to get before the jury in some way this evidence of wrong-doing, pursuing a course calculated to sorely try the patience of a judge, in doing so, impassive almost to the point of insensibility.

We have already referred to the incident at Bainville as to Hubener's testimony at so much length and have set forth the testimony as the record presents it, that little good would be subserved by reviewing it here at any greater length. As we read appellant's brief, and as each circumstance is given consideration, we cannot refrain from using the quotation from Shakespeare:

"Trifles light as air are to the jealous confirmation strong as proofs of holy writ."

When the question was settled that the driver's condition on the day of the accident was the proper subject of inquiry, the court said "yes". That is the attitude the court maintains. "If you have anything in reference to that at all you may proceed". (Tr. p. 143).

Complaint is now made as to the use of this language. We quote from the brief of the plaintiff in error, as follows:

“The court said: *‘If you have anything in relation to that at all you may proceed,’* from which remark the jury may have understood that the court meant to indicate, we think, a sort of anticipatory lack of credence in any testimony along these lines, and the court’s action seemed to carry the possibility of it conveying a warning to the witness not to incur the court’s displeasure in any testimony which the witness might be about to give on a matter which the court had thus for so long forbidden defendant from rebutting (Tr. p. 142 to 143).”

(Brief p. 16).

We don’t share with counsel the belief that the language under review is susceptible of the sinister construction which is given to it.

If, however, any fear was entertained that its use had a prejudicial effect upon the jury, the court was not advised of that fact. If there was any improper, unnecessary emphasis or inflection that gave the language the significance which is now given to it, the record is silent on the subject.

We rather believe, without laying claim to excellence in casuistry, that this language was intended to convey the idea to counsel that if he had any evidence, proximate or remote, direct or circumstantial, bearing upon the intoxication of the driver on the day of the accident, such evidence could be introduced.

The testimony of Mr. Hubener is then analyzed.

(Brief p. 17).

We have heretofore presented in full the portion of the record which contains the proceedings

that transpired when the witness was examined.

These proceedings appear at pages 145, 146 and 147 of the record.

Antecedent those proceedings, the witness testified in detail what he knew about Mr. Bigelow's condition. He testified without objection that Bigelow was not drunk; that he apparently looked all right; that he was in the witness' place of business, and that they naturally had a few drinks together. (Tr. p. 146). Not satisfied with this, counsel desired to know how, in the language of the street, his condition would be described. Although this was objected to the witness answered by saying, "Well, as near as I can describe it, I would put it this way, he was not drunk but feeling good. That is about as close as I could come to it." Nothing daunted, counsel then put this question:

"Q. Well, didn't you describe it to me as just short of a good start for a spree?

A. Well, if he was feeling good, I suppose if he stayed there, why naturally he would have wound up in a spree.

By the Court: You will have to explain to the jury where the man started from—his condition short of the start."

Again the question is put to the witness. This time an objection is interposed, and the objection being sustained, an offer of proof is made, that the witness told counsel that Bigelow's condition was "just short of a good start for a spree." An objection is made to this offer of proof, and the court said: "It is very vague. I don't see that it

would enlighten the jury any if he did see him at that stage.”

Having a personal knowledge of counsel's great ability in argumentation, we have perused much of counsel's argument as to the misconduct of the court with mingled feelings of amusement and appreciation. The portion we have now under consideration, we read with surprise and astonishment. We believe that counsel has candor enough to admit that the court at this juncture did not make the statement which before correction read that it would not enlighten the jury if the witness did see him “drunk.”

If through remissness or oversight, a palpable error exists in a bill of exceptions, a correction of same can surely be made by the trial judge, and it seems to us in awful poor taste in the printing of the transcript, that the correct portions and the corrections should both appear. If such was the remark which the court made, why should counsel overlook same, ever vigilant as the record shows he was, and why should counsel, where an exception would amount to something, remain silent? Why should such a remark be made by the court when again and again, the court had ruled that Bigelow's condition as to drunkenness on the day of the runaway was a proper subject of inquiry. Counsel does not contend that this court can act on the assumption that such a remark was made by the court. Its interpolation in the record is unfair, unjust and unwarranted, and

with this characterization of it, we will pass to something else.

And lastly, under this heading, we are told, piling "Pelion on Ossa," the court instructing the jury and commenting on the evidence, said that most men take a drink or two occasionally. (The language of the court is set forth in appellant's brief, pp. 22 and 23).

Suffice it to say that it is within the court's province to comment on the evidence, and suffice it to say, too, that the court's instructions and the court's comments seemed to meet with the unqualified approval of the learned counsel, except in the particular that the court refused to instruct on the last clear chance doctrine so-called.

CARCASS DID NOT CAUSE RUNAWAY.

Under this heading still canvassing the misconduct of the court, the testimony of Provost is referred to as presenting evidence showing an unfriendly disposition on the part of the court.

We quote from the brief, as follows:

"Let us bear in mind that this witness is shown by the transcript to have been affected by the court's attitude to such an extent that on cross-examination, when asked whether he was not a 'standing witness' for the railway company, dazed, he answered 'yes,' though proof showed that he had never been a witness except in a single instance, at which time he was an eye-witness."

(Brief, p. 26).

We are repeatedly told in the course of coun-

sel's argument, not exactly using his phraseology, that he suffered discomfiture and dismay by reason of the court's rulings and demeanor, so that his client's interests suffered, and that the jurors, undoubtedly, observant of what was occurring, may have been prejudiced by these happenings to which reference is made.

We were prepared to hear this. We must confess, however, we were not prepared to hear from the learned counsel the charge which the foregoing excerpt suggests, and while we were prepared, with the complaints made on the argument on motion for a new trial, to hear that the learned counsel himself was discomposed and disturbed to the point of exhaustion, we were not prepared to hear from counsel that the cause that almost prostrated him, likewise, served to "daze" the witnesses, so that counsel was unable to get the best service out of them. Although fearful of being punished for judicial sacrilege through speaking irreverently of judges, even in jest, having in mind the complaints which the distinguished counsel makes of Judge Bourquin, and having in mind "the supposed" effect of the judge's conduct, and to fittingly describe him from the standpoint of the plaintiff in error, we would have to borrow the title of that modern ragtime melody, "He's a devil in his own home town."

The subject is, however, not one for levity, and in a more serious mood, we must resume the task

of attempting to exculpate the judge, so as to save him from being "drawn and quartered."

The transcript shows the following:

"Q. As a matter of fact, you are a standing witness, aren't you, for the Great Northern Railway Company in all of their cases?

A. Standing witness?

Q. Yes, in all of those cases you are always called as a witness for the railroad company?

A. Yes, sir, I was called a few times."
(Tr. p. 161).

And upon re-direct examination, with nerve-straining detail, this incident is detailed as follows:

"Yes, sir, I have been a witness for the Great Northern Railway Company once or twice. I did not testify in this case before. I was called as a witness at the last trial, but I was never on the stand. I have also testified for the Great Northern Railway Company in Glasgow in a fire case and in Williston, North Dakota. The cases in Glasgow and in Williston were not different fires, but two cases for the same fire. I have testified for the Great Northern in no other case."

(Tr. p. 162).

This evidence does not justify the conclusion by any means that the witness was in the dazed condition which the brief suggests. Besides, the record is silent on the subject, as to whether the witness was present in the court room before being called to the stand. The probability is that he was not. We are tempted to exclaim, "Of such airy nothings are dreams made of." The very

acme of impropriety is reached, however, when an objection is sustained to the following question:

“Q. Is there anything, Mr. Provost, that would refresh your recollection and enable you to testify as to any use of that crossing from April 1st to the 18th?

By Col. Nolan: We object to that as leading and repetition of what the witness has already stated.”

(Tr. p. 156).

In the brief it is stated that the objector said the question was leading and “*suggestive*.” (See Brief, page 26).

When this objection was made, as the transcript will disclose, the witness had already told with extreme detail what he knew about the crossing. The question, in the light of the disclosures already made, could elicit nothing new, and the objection to it was properly sustained.

We quote as follows from the record:

“Q. Can you give us any other description of the horses, other than that they were a high-strung team?

A. No, sir.

Q. Would you call them bronchos?

By Col. Nolan: To that we object as leading.

By the Court: The objection is sustained.

By Mr. Veazey: Where counsel asks questions and endeavors to get the facts, and the witness for one reason or another, perhaps because of the glamour of the courtroom, or what not, is not able to respond readily—

By the Court: I don't care to hear an argument. The court has ruled.”

(Tr. p. 158).

What admirable tact! What subtle versatility! We have heard judicial sternness and judicial unfairness and judicial hostility described in many ways, more or less expressive, and in most instances in terms of severity, but it remains for the distinguished counsel representing the plaintiff in error to describe it as the glamour of the court room.

Whatever may be said *now* by distinguished counsel as to disadvantages suffered through the court's ruling or demeanor the record gives no evidence of same. As evidence of this we might instance the effort on his part to elicit testimony from Mr. Provost as to the disposition of the team. Its disposition is shown in every conceivable way. The horses are not kittens. They have a broncho disposition. They are a high-strung team. These facts are developed time and again, and, after this is done four pages of the record are consumed in saving exceptions, because repetition is forbidden. We ask in all candor after reading the evidence on this point as well as reading the record in the other matters where it teems with exceptions, where is the evidence that is at all competent or remotely competent that has been excluded? The repeated efforts where adverse rulings are made, because the evidence is already in, does not show that the distinguished counsel suffered any embarrassment by reason of what was taking place. In most cases where adverse rulings are recorded, counsel in disregard

of them, returns to the same matter and persists in putting the same questions.

Another feature that might be commented on, as to the rulings complained of and as to which exceptions are preserved. The objection in most cases seems to be made after the answer is given, and the answer stands, regardless of the objection interposed to the question.

Complaint is, likewise, made as to something that transpired in connection with the examination of the witness Lundquist. Mr. Lundquist is undergoing cross-examination as follows:

“Well, now do you pretend to tell us, Mr. Lundquist, that it was not any decomposed—any decomposition in that flesh there at all?

A. Not as bad as later on in the summer when the weather was warm.

Q. I don’t care how it would be, but I am asking you was there any at all?

A. I never noticed any.

Q. You wouldn’t say that there was, or was not?

A. No, I wouldn’t. I knew there was nothing said about any smell that day.

Q. I didn’t ask you about that, Mr. Lundquist. Will you kindly answer my question.

By the Court: Yes, don’t volunteer any information.”

(Tr. p. 181.)

To see how a molehill may become a mountain, we quote from the appellant’s brief:

“On the same subject the witness John Lundquist, who was a merchant, banker and rancher, drove to the scene of the accident over the very crossing in question as soon as the accident occurred. He testified that the

carcass did not bother his horse and was not in a condition to bother horses. He is severely cross-examined, and he endeavors to answer as a layman would answer. He is asked whether there was any decomposition in the flesh at all. He answers 'there was not as bad decomposition as there would be if the flesh had rested there in the warm weather of summer'. The answer was directly responsive. Counsel improperly reprimands him, with no disapproval of the court, on the ground that this responsive answer was not responsive. 'I don't care how it would be; I am asking was there any at all'. The witness answers, 'I never noticed any.' Still not content with the examination counsel asks again, 'You would not say there was or was not?'

(Tr. pp. 180-181).

The witness has answered every question, and, pressed on by another question, endeavors as a layman will to ascertain what is intended and to cover the same. He answers, as a conclusive effort to express his views, 'No, I would not. I know there was nothing said about any smell that day.' The answer in the first three words was directly responsive and the last represented merely a layman's effort to grasp the situation and meet it, and yet counsel rebukes the witness and asks him to answer the question, though the witness has done so, and the court, *without protecting the witness to the extent that he had answered the question*, sustains plaintiffs throughout, and *reprimands the witness*.

'Yes, don't volunteer any information.' Note that the court does not call attention to the fact that the objection as made was not well taken, but that a motion to strike out part of the answer might be sustained on the ground that the witness had answered the

question and then had added more, which the court would choose to declare volunteered. The court's ruling is entirely in favor of the plaintiff and against the witness and is accompanied by a sharp rebuke for mere unintentional, natural, technical misconduct of a layman as a witness (Tr. p. 181). The effect on the jury could not have been but adverse."

(Brief, pp. 28, 29 and 30).

The most remarkable feature of this occurrence is that no objection was made and no exception was preserved.

Lastly on this subject, for so it is stated in counsel's brief, complaint is made because of his inability to go into details as to how and why and for what reason the witness Hamilton knew that the carcass did not emit any odor. We have heretofore in this brief given the testimony in its entirety as to this matter, and refrain from doing so now.

Counsel advises us that at this stage of the proceedings he did not even dare to more than scarcely approach the subject in hand, and that worn out by the course of the trial he appealed to the court to trust him this particular time, but that the court simply "scolded" and commented harshly and improperly on the witness' former testimony, and handled questions of fact for the jury as decisions of law to be made by the court as to the weight of the evidence. (Tr. p. 35).

A reference to the transcript disclosing this occurrence shows that counsel does himself injus-

tice, for after the scene closes and after everything that he seeks to elicit is elicited, he gets the witness to testify as follows:

“I do not know of any instances where a horse, or horses have been frightened by the carcass of another animal to such an extent that they have run away. I was prospecting for gravel, and I met bones, piles of bones there. They didn’t scare my horse there at all, but if there was a moving piece of paper or glass, or anything of that kind, my horse would get scared, but didn’t get scared of any bones.”

(Tr. p. 195).

MISCELLANEOUS MATTERS.

Under this heading, and still dealing with the court’s misconduct, we encounter an episode in connection with the testimony of Mr. Bigelow. Upon the first trial of the case when the fatal variance was urged, on the proof submitted, which substantially was the proof submitted in the instant trial, Mr. Bigelow testified. He was absent from the state when the instant trial took place, and his testimony on the former trial was used. In connection with its use the record shows the following:

“Thereupon it was stipulated between the parties that the driver Bigelow was not now in the state of Montana and was probably in the state of South Dakota, and that the transcript was a true transcript of what the witness Bigelow testified to at the former trial. Thereupon counsel for plaintiff offered to read said

transcript of the testimony of the said driver Bigelow, but the defendant objected thereto on the ground that the said testimony constitutes mere hearsay, and the witness himself must be called, and the inability to call him has not been sufficiently established, and on the further ground that at the time of the examination of the witness Bigelow at the last trial, the defendant did not have impeaching testimony, and accordingly the witness was asked in the course of his examination in regard to impeaching testimony for the purpose of ascertaining whether any impeaching testimony would be available and whether he would admit that impeaching testimony existed, but since the last trial the defendant has secured impeaching testimony and also upon the ground that the testimony of the witness as disclosed in the transcript is too unintelligible and uncertain to be understood, in that the witness referred in his testimony to a plat and indicated the places referred to on the plat by such expressions as 'here' and 'there' pointing to the plat, and the meaning of such references are now lost, which objections were by the court overruled, to which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed."

(Tr. pp. 81 and 82).

The witness had made a statement to the claim agent of the defendant company regarding the runaway and his attention was called to same on cross-examination. The testimony relating thereto is as follows:

"Thereupon there was offered and received in evidence a written statement signed by the

witness and referred to in this testimony reading as follows:

“A small piece of paper on a bush fluttered considerably close to this crossing which frightened the team. This was about at the bottom of the hill referred to. I had just got the team quieted down when we reached the fill or approach to the track. At that moment the wind blew the odor from the dead carcass right toward them, which frightened the team, so that they became unmanageable and ran away. As to whether as I approached this crossing I did not expect the horses to be frightened to such an extent that they would get beyond control. I had a tight hold on them in case I thought I had control over them enough to hold them. No, as I approached this crossing I did not expect the horses to be frightened to such an extent that they would get beyond control. No, sir. I had not been drinking any that day. As to whether I am a drinking man, yes, sir. I take a drink. I was not drinking intoxicating liquors prior to that time to excess.

Q. Do you remember at any time or did you at any time state to anyone at any place that it was this piece of paper which caused this runaway, and not this carcass?

By General Nolan: I object to that. This is a witness in the case, and I suppose if there is some evidence it was made in some particular statement.

By the Court: Sustained.

By Mr. Veazey: We are not laying the foundation for impeachment, but are inquiring for evidence.

By General Nolan: Well, then, if you are not, the testimony is incompetent. Of course, any statements made by this man would be hearsay, except insofar as this statement

would be contradictory to anything he has said on the stand here.

By the Court: I will allow him to answer the question.

Q. Did you ever at any time or at any place make any statements to anyone to the effect that this runaway had been caused by the horses becoming frightened at the piece of paper, and not by the carcass?

A. No, sir."

(Tr. pp. 92-93.)

Before the first question above set forth, beginning with the words "Do you remember at any time or did you at any time," etc., was read counsel for the defendant advised the court that the defendant desired to withdraw said question and to waive it, and advised the court that if the witness were present an impeaching question would be propounded, since impeaching testimony was not available, and defendant demanded that the witness be produced in order that an impeaching question might be propounded, but the court declined to allow said question to be withdrawn or the answer thereto to be withdrawn. To which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon noted and allowed, and the court, likewise, overruled the demand of the defendant that said witness be produced, to which ruling of the court the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.

Likewise when that part of said transcript containing the objection to said question and the

court's ruling sustaining said objection and the declaration by counsel for the defendant that defendant was not laying the foundation for impeachment, but was inquiring for impeaching evidence was read, counsel for defendant advised the court that defendant desired to withdraw said disclaimer; that it was not laying the foundation for impeachment and counsel stated that at the time of the former trial, the defendant did not have any impeaching testimony, and was forced to inquire of the witness as to whether there was any, and could not call his attention to any particular statement on impeaching testimony, but that since then, impeaching testimony had been procured and defendant desired, therefore, to withdraw said disclaimer, and to impeach the witness.

“By the Court: The court will not permit it. Now we will hear what the witness has to say and bring that up later.

To which ruling of the court, the defendant by its counsel then and there duly excepted, which said exception was thereupon duly noted and allowed.”

(Tr. pp. 92-95).

These proceedings are referred to as indicating hostility on the part of the court. As to the correctness of the court's ruling on this, we will discuss it at a later time. We present the transaction here and give it in its entirety for the purpose of showing that it does not present any evidence of the judge's unfriendliness, and that in the occurrence itself, there is nothing in what transpired to justify the claim that the court's rulings or the

language in which they were embodied, contained anything to indicate hostility. If the demands of counsel were warranted, under the law, then error was committed, and the rights of the plaintiff in error are amply protected. The correctness or incorrectness of the rulings are subject to review on appeal. We make the point, however, that these rulings, adverse to the contentions of plaintiff in error should not be made the basis of a criticism, that because these rulings were made, the trial court evinced feelings of hostility or unfriendliness towards the plaintiff in error. In the colloquy which took place between counsel and the court, wherein counsel complained of being at a disadvantage because the witness was not present, so that an impeaching question might be put to him, the court said:

"You disclaimed any intention to impeach Bigelow when you put to him a question which was not a proper impeaching question. You expressly said it was not for the purpose of impeachment. It is your misfortune that you did not have the impeaching testimony at the time Bigelow testified. It is not the fault of the other side. Even the best cases (to say nothing of the case of the defendant in this instance) are sometimes lost because testimony cannot be produced."

(Brief of plaintiff in error, p. 40).

We note in the excerpt as it appears in the brief that certain portions of same are italicized. For what reason and on what basis, we are unable to say. At any rate, this declaration by the court is referred to as evidencing hostility.

The language in the transcript does not reveal how it was spoken. It is silent on the score of inflection and emphasis. The learned counsel seemingly desires reproducing it in his brief to supply these omissions.

The stipulation which showed that the witness was beyond the jurisdiction of the court rendered admissible Mr. Bigelow's testimony given at the former trial. This testimony was in the nature of a deposition. At first blush, it would seem at least that the objections to its use bordered on the frivolous. The demand that the court produce the witness, so that an impeaching question might be propounded, at first blush, at least would seem to border on the ridiculous.

Why should the court remain silent when these demands were made? Can language more temperate be imagined, a compliance with such demands being insisted upon. We repeat again that this record shows remarkable judicial patience and equanimity.

We are justified in saying in this connection, too, that counsel knew before the trial that this evidence would be used. He was advised that by reason of the witness being in Dakota the evidence would be used. The suggestion in the brief that the witness might have been sent there, so as to be absent from the trial is unwarranted under the facts. The defendants in error did not know that counsel for the plaintiff in error had in seclusion this impeaching question. Having

this impeaching question in reserve there was nothing to prevent counsel from taking the deposition of Bigelow in Dakota, so that a proper foundation might be laid for the impeaching question.

We submit that there is a good deal of pyrotechnics about this whole matter.

And lastly some language of the court is complained of in a colloquy which took place between the court and counsel as to the law which would govern the relation of master and servant as applied to the instant case, and as to whether Bigelow's negligence in driving the team would be imputed to Dr. Ennis. After hearing counsel in argument on some of the matters incorporated in his motion the court declined to hear argument on the question that Bigelow's negligence would proclude recovery, remarking "Oh, everybody knows that." This language is objected to because of its injurious effect upon the jury. The record does not disclose the fact that the jurors were present. Even if they were, how could they be influenced by this remark?

Counsel now says that this is a disputed question: The record does not show in the colloquy in question any overwhelming desire to advise the court that it was a question on which courts of eminent respectability differed, probably not, however, with the facts such as they were in the instant case. The Montana authority referred to favorable to appellant's contention and in line

with his suggestion has repeatedly received merited adverse criticism from other courts, and it is a question as to whether the doctrine of the particular case has not been modified if not overthrown by subsequent declarations of the same court.

We refer to the case of

Whittaker v. City of Helena, 14 Mont. 124.

We have probably with unnecessary prolixity reviewed the remarks of the learned counsel directed to the misconduct of the court.

We did so because we feel the castigations are unmerited and undeserved.

The writer appreciates, and so we believe the able counsel representing the plaintiff in error, that Judge Bourquin transacts business with celerity and dispatch. Of him, as much as any judge exercising judicial functions today, it can be truthfully said, that he plays "ball all the time." It is this characteristic which enables him to handle the large volume of business which he does, and it is this characteristic which enabled him, since his accession to the bench, to dispose of an accumulated and congested docket, so that now instead of waiting for years before a case would be reached, the litigant by reason of the up-to-date condition of the docket may obtain a trial when the case is at issue. We have no brief to sing the praises of Judge Bourquin in these proceedings, but we feel constrained to say this, be-

cause in the record before us he shows evidence of a disposition to keep things moving.

But after all is said and done, what is there on this branch of the case which is subject to review? The case is here on a writ of error. Is the court's language objected to and an exception saved? And was the court, in connection with the language used, asked to retract same? Under the state practice, the misconduct of the court, in the particulars referred to, is generally shown by affidavit. At any rate, so that the court's action may be subject to review, it is necessary that the court should be called upon to do something or refrain from doing something, and its failure in these particulars should be excepted to. Nothing of the kind appears here.

We respectfully submit that the fate of this case will depend, not on the misconduct of the court resting on vague imaginings, but as to whether or not errors have been committed in the trial of the case operating to the prejudice of the appellant.

The learned trial judge reviewed all these complaints when the motion for a new trial was overruled. The decision, while not in the transcript, has been certified to this court, and this court's attention is respectfully invited to same.

PLAINTIFF'S EFFORT TO REPUDIATE ELECTION MADE.

We have heretofore discussed this matter. The amended pleadings were filed from time to time

as objections were hurled at them and agreeably to the court's order. This being true, we do not understand the force of the deduction which appears at page 58 of appellant's brief, as follows:

"Therefore, the motions to strike portions of the first and second amended complaints, notwithstanding the disclaimer of counsel then made, should have been sustained, and the court erred in submitting the cause on the basis of the roadway being a public highway by estoppel, and in not submitting the cause on the basis of the roadway being a mere invited or licensed way."

Whether the roadway was a highway by estoppel or whether it was a roadway to which the public were invited, in what respect was appellant prejudiced. There is even no basis for this contention that the defendants in error shifted positions. The proofs available were always the same. The proof first presented under the allegation in the first complaint that this road was a public highway differed in no particular from the proof presented by the record. In the first place, plaintiffs alleged that this was a public highway and upon presenting the proof, they were told that there was a fatal variance. In the succeeding pleadings they alleged the facts and insisted that on those facts which were uncontradicted, the railway company owed to those using the roadway the duty of exercising ordinary care.

Indeed the court expressly told the jury that the roadway was not a legal highway, in that it had not been laid out by the county with all the

requirements of the law. The jury were told, however, that the conditions attendant upon its use, were such that the obligations resting upon the railway company were the same as if it were a public highway. (Tr. p. 218).

Suppose that instead of setting up the facts in detail as to the use of this road, we simply alleged that the roadway was one by invitation, to what extent would plaintiff in error be benefited. Not so by the admission or exclusion of proof. Not so by changed instructions prescribing changed obligations and duties. In both cases, the proof would be the same and in both cases the measure of duty would be the same.

We quote as follows from the case of

Hanson v. Spokane Valley Land & Water Co., 107 Pac. 864:

“While the complaint alleges that the road was a private road and way of necessity, it also alleges in that same connection, that the road was traveled over by the public generally, constantly, and daily for some years prior to January 1, 1908. The effect of these allegations is that the road was a public way over private land. The whole allegation taken together could mean nothing else. It is not claimed that the plaintiff was the owner of the way, but he certainly had the same right as any of the public to use it. While the complaint does not directly allege an invitation to the public, it appears that the public made use of the way for ‘some years prior to January 1, 1908,’ and that the way connected with the public highway on the north of section 4. This amounts to an implied invitation, be-

cause public user, long continued, will imply an invitation. (Phillips v. Library Co., 55 N. J. Law, 307, 27 Atl. 478). Or it may be implied when an owner by acts or conduct leads another to believe that the land was intended to be used as he used it, and that such use is not only acquiesced in by the owners, but is in accordance with the intention or design for which the way was adapted or allowed to be used. (Turess v. N. Y. S. & W. R. Co., 61 N. J. Law, 314, 40 Atl., 614. It follows, therefore, that the respondent was not a mere licensee. He was an invitee under the alleged facts. Such invitation would continue so long as the way remained open and the public availed itself of such use, and while continued, the owners and others would be liable the same as though such road were regularly laid out and owned by the public.”

In the case of

Midland Valley R. Co. v. Shores, 136 Pac.
157, 49 L. R. A. (N. S.) 814,

the court said

“There is abundant authority to the effect that a railroad crossing may not be upon a public highway, yet, if the track has been used by travelers as a public crossing for a long time with the knowledge of the company, and without objection, and the company has treated the same as a public crossing, it will be presumed to be such, and the railway company will be bound to exercise ordinary care to prevent injury to persons using the same. The above rule is approved in 2 Elliott on Roads & Streets, Sec. 1019, where the authorities will be found collected in a footnote. * * * A case in point which illustrates the rule as well as any we have been able to find is Webb v. Portland & K. R.

Co. 57 Me. 117, wherein it was held that 'in the trial of an action for an injury alleged to have been received while passing along a 'public street and highway across the railroad track of the defendants' if the evidence of a legal location is wanting, it is proper to instruct the jury that there was no legal highway by reason of any proper location, but that, if the jury should find that with the consent of the company owning the track and having the right of passage there with trains, and of the owners of the fee in the land there had been a thoroughfare in open and continuous use by the public, and all who had occasion to go between the termini mentioned, and that use commenced prior to the running of the defendants' trains there, and continued to the time of the accident without objection made by the company owning the track, or the owners of the fee, or the defendants, they might thence infer the existence of such a way and right of crossing the railroad at grade there, as would bind the defendants to the use of the same precautions, prudence, care and diligence in running their engines as they would be bound to exercise if a highway had been located across the track there at grade."

But why continue the discussion of this point further. The instructions defining the measure of duty were not objected to.

We respectfully submit that as to this contention, the learned counsel representing the plaintiff in error is adding insult to injury. In the first trial he got the court to hold there was a variance because the proof showed that Mrs. Ennis was an invitee, and succeeded in forcing a continu-

ance of the trial. Confessedly, the measure of duty was the same, and now, when the facts are pleaded which were before the court then, it is suggested that instead of Mrs. Ennis being an invitee, she was using a public highway, made so by estoppel. This designation is a new one, at least, in Montana. In that state, we have public highways, whose existence, from the standpoint of the plaintiff in error depends upon a strict compliance with the law, and we have highways by prescription.

We submit that in this case, however, the roadway may be characterized; the company owed the user the duty of exercising reasonable care in reference to it, and owed the user the duty of not maintaining a nuisance through the presence there of a malodorous carcass.

NO NEGLIGENCE OF DEFENDANT.

Under this heading, it is contended first that the proof failed to show that the object was one which would frighten horses of ordinary gentleness, and second, that the proof showed that the carcass was between the road fences, and thus on a part of a roadway, and, therefore, on the theory that the road was a public highway, the county and not the defendant would be liable.

First, as to the insufficiency of the complaint and of the proof as to the carcass frightening animals of ordinary gentleness;

The suggestion is made that the complaint is fatally defective, because of the absence of an

averment, that the carcass was such as was likely to frighten horses of ordinary gentleness. This objection to the complaint on this score is presented for the first time in the brief. While it is true that a general demurrer was interposed and a general objection was made to the admission of evidence because the complaint didn't state a cause of action, we submit that the court will not look with favor on this objection presented for the first time in this court, even though the court should be inclined to hold that the complaint should contain this averment. No authorities are cited in appellant's brief to support the contention that the complaint is fatally defective because of the absence of this averment. Indeed, the courts hold uniformly and universally to the contrary. Assuming, however, for the sake of the argument that such an averment should appear in the complaint, the case was tried upon the theory that that was the test, and the instructions which were given to the jury made that the test, so that the plaintiff in error cannot now complain because of the absence of the averment from the complaint.

In the case of

Baltimore, etc. R. R. Co. v. Slaughter, 167

Ind. 330, 79 N. E. 186, 119 Am. St. Rep. 503,

the court said:

“The next objection which appellant's counsel urge against the complaint is that it fails to aver that the handcar and articles thereon were calculated to frighten horses of

ordinary gentleness. There is no doubt that this is an essential element in the case, but it does not follow that it must be specifically alleged. It is charged that the defendant carelessly and negligently placed said handcar lengthwise upon the crossing, and carelessly and negligently obstructed the free use of the same by said handcar and also that the accident and injuries set forth were caused by, and were the direct result of, the negligence charged. We are of opinion that it was not necessary to plead more specifically as to the nature of the defect. It is a general rule, both in this state and elsewhere, that in complaints or declarations for negligence it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. If the pleading is not sufficiently specific, the remedy is by motion; it cannot be taken advantage of by demurrer."

There is an extensive note to the case of *King v. Ore. Short Line R. R. Co.*, 59 L. R. A. 209, where this subject in general terms is discussed. And at page 230 cases are cited which refer to the specific subject now under consideration (frightening horses).

After verdict the complaint is to be considered with regard to the proof rather than its strict allegations.

Johnson v. Ryan, 112 Pac. 1114.

We submit that plaintiff in error remaining silent as to this alleged defect is not now in a very advantageous position to urge that the complaint

should contain this averment, suggesting its materiality for the first time in this court.

SUFFICIENCY OF PROOF.

Plaintiff in error contends that the proof is insufficient to show that the carcass in the condition in which it was, emitting the odor which it did, would frighten horses of ordinary gentleness. Mr. Ennis testified that he owned the team that ran away about six weeks before the runaway, and had seen the team for about six months before that; that he drove them a good deal, and that anybody might drive them; that they were broken and gentle. (Tr. p. 66). That he learned of the existence of the carcass in January, 1909; that when he first saw it it was burned. (Tr. p. 67.) That he saw the carcass after that frequently. (Tr. p. 69). He last saw it on Thursday preceding the Sunday when the accident occurred. (Tr. p. 68). That he had been driving those horses back and forth there about four or five weeks before the accident. (Tr. p. 68), and didn't have any trouble at any time. (Tr. p. 68). That he noticed the carcass there after it got warm weather, and that about the first of April he noticed there was some smell from the carcass, and that it got stronger as it grew later in the month. (Tr. p. 68). That the carcass in the condition in which it was would have a tendency to frighten horses, and it always does. (Tr. p. 69).

On cross-examination he testified that he told

Mr. Bigelow about the horses being skittish at the carcass after it began to smell. (Tr. p. 75).

Mr. Bigelow testified on this subject, stating that the team was gentle and tractable. (Tr. p. 84), and speaking about the carcass, said that it emitted odor on the day of the accident. (Tr. p. 84). That on going to Bainville the horses shied a little, and outside of that he had no trouble with the team. (Tr. p. 85). That on returning, there was a steep rise, and when the team reached the crest of the little hill, the carcass came suddenly into view, and the wind was blowing from the south-east, and the team lurched and shied around, so that he could not control them. (Tr. p. 86). That the carcass of a horse is an object which is likely to frighten a horse to such an extent that he will run away. (Tr. p. 88). That although this object was likely to frighten horses and cause them to run away, he didn't expect the team to run away at this time, because he thought he was horse-man enough to handle these horses. (Tr. p. 88).

Mrs. Charles Allison testified before the accident she had occasion to cross at this crossing almost every day, and that the odor from the carcass was strong enough, so that people crossing could notice it. (Tr. p. 100). That the runaway team was a gentle team (Tr. p. 100). On cross-examination she testified that sometimes she drove a team and sometimes a horse across there, and noticed the odor from the carcass, and that the horses would always be frightened. (Tr. p.

104). That the presence of the carcass there would ordinarily frighten horses, but as to whether she would expect it to frighten horses to such an extent as to make them run away, she was always afraid to cross there, and someone drove her horses. (Tr. p. 106). They didn't run away. (Tr. p. 107).

Mrs. Katie Meinhardt, who drove the runaway team with Mrs. Ennis from Bainville to the Hubener farm on the day of the accident, testified that the team was perfectly gentle.

R. H. Sweetman testified that when driving over this crossing, his horses noticed the carcass, and that he had trouble with one team in crossing there on account of the carcass; that when the horses got on the track they saw the carcass and stopped, and he had to whip them to get them off the track; that the flesh was partly removed from the bones of the carcass. (Tr. p. 114).

Charles N. Bain testified that in going back and forth he noticed the odor from the carcass and during the month of April it smelled pretty strong. (Tr. p. 120). That he had considerable experience in handling horses, and that the smell from a carcass would have a tendency to frighten horses.

Fred Swan testified that the carcass as he crossed there gave forth odor at times if the wind was in the right direction; that when he crossed there he was riding a saddle horse, and that he

would always shy around, and that his horse was considered a very gentle horse. (Tr. p. 25).

The testimony adduced in behalf of the defendant was to the effect that there was no odor at all, and that the carcass of a horse would have no effect upon horses in the way of frightening them. How, in the light of this evidence, can it be urged that the proof failed to show that the carcass would not frighten gentle horses?

It is also contended under this heading that the county was responsible and not the defendant company, and in this connection it is urged that someone most likely forced the animal on the track ahead of an on-coming train, and with sublime confidence we are asked to cite some authority to the effect that one whose negligence is not shown to have contributed to the creation of a nuisance on a highway can, without fault on his part, be placed in fault for not abating the nuisance, which first arose without his fault.

The proof shows that the carcass was on the right of way of the defendant company. (Tr. p. 74).

John Hamilton, the foreman of the section, testified as follows:

“I started to prospect for gravel the same day the horse got killed. I saw the horse there that same day. It was discovered in the morning about seven or eight o'clock. The horse was then dead. I had been over that place the day before about half past four or four o'clock. There was nothing there then.

I made an examination of the horse the next morning at half past eight o'clock. The horse was cut on the hip. The skin was broken. The horse was about sixteen or seventeen feet on the outside of the rail. The horse lay between the space between the wind fence and the cattle-guard. I don't know exactly how far up. I would say it was about ten feet from the cattle-guards. Trains passed through there in the night time. During the night preceding the morning when I first saw this carcass on this roadway there were two passenger trains during the night and several freight trains—I don't know how many."

(Tr. pp. 126-127).

In addition to this testimony, the witness directed the foreman to make a report that the horse was killed by the railroad, and thereafter repeated efforts were made by the railway company to destroy the carcass. Those efforts, or some of them at least, were under the direction of the assistant road master. (Tr. p. 129).

On this proof we submit that it was a question for the jury to say whether or not the horse was killed by the defendant company.

Thompson on Negligence lays down the rule as to the sufficiency of the proof in cases of this kind, as follows:

Sec. 2194: "As to the evidence necessary to sustain an allegation of injury * * * it is sufficient that it appears that the animals were found on the side of the railroad track 'badly smashed up' and that no other reasonable cause could be assigned for the casualty, though no one saw the locomotive strike them. The jury, under such circumstances,

are at liberty to infer that the injury was caused by the cars or locomotive of the defendant.”

In an action against a railroad company to recover for a cow alleged to have been killed by the negligence of the railway company, the evidence showed that the cow had been turned out by the plaintiff on a common near the railroad track to graze; was found in a ditch near the track with two legs broken, the land on both sides of the track belonging to the railroad company; it was held that the evidence was sufficient to justify the submission of the case to the jury.

Rowe v. Greenfield Co., 7 S. C. 167.

A mule was found the day after the alleged injury with an eye knocked out and a jaw bone broken. The plaintiff tracked the animal to the defendant's track and at the foot of a grade near a trestle found evidence of where the mule had been knocked off or had fallen down from the track, and had found hair from the mule and blood on ties, and at the foot of the embankment where the mule had evidently been lying, tracks of a mule were also found on the railroad track extending for a distance of seventy-five yards north of where the mule was alleged to have been knocked from the track. It was held that the evidence was sufficient to take the case to the jury.

Johnson v. Hill, 39 So. 780.

We insist, however, that regardless of whether the company killed the animal, a liability exists

on the part of the railroad company on account of maintaining on its property a public nuisance. It is suggested, however, that we have proceeded upon the theory that the roadway in question was a highway by estoppel. We have already referred to this contention. On the first trial, at the instance of the plaintiff in error, we were prevented from recovering upon the basis that the highway was a public highway, and that the land belonged to the railroad company, and that the use of the public road was an invited use. This apparently is the contention of the defendant company; this is the theory upon which the case was tried.

If the defendant company maintained on its premises the carcass of a horse, so that it emitted offensive odors, it maintained a nuisance, and for injuries done thereby, it is liable. In the second amended complaint it is alleged, paragraph I:

“That at all times hereinafter mentioned, the defendant Great Northern Railway Company was and is a corporation, organized and existing under the laws of the State of Minnesota, and at all of said times owned and operated a line of railway running across the State of Montana and across Valley County, in said state, and at all of said times owned, in connection with said railway, a right of way, which right of way, at the place hereinafter referred to, as used for a roadway and as the place where the runaway hereinafter referred to occurred, embraces a strip of ground about seventy-five feet wide on each

side of the track, running parallel to said track.”

(Tr. pp. 7-8).

In paragraph III. it is alleged that the roadway crossed this right of way. In paragraph VII. it is alleged that the defendant company invited the public to use this roadway, and paragraph VIII. is as follows:

“Plaintiffs further aver that during the month of December, 1908, the defendant company placed, and caused to be placed on its said right of way and in close proximity to said traveled roadway, and in such position so that it could readily be seen by animals traveling on said roadway, as it crossed said right of way, the carcass of a horse.”

(Tr. p. 11).

And in paragraph IX. it is averred that the defendant company negligently permitted the carcass to remain where it was so placed from the month of December, 1908, until the 18th day of April, 1909, and that for more than a month prior to the 18th day of April, 1909, the carcass suffering decomposition, exhaled noxious and putrid odors, so that it became a public nuisance and became an object likely to frighten teams driven along said roadway.

The answer to this complaint admits the allegations of paragraph I. Admits that the roadway crossed the right of way, and admits that the carcass lay near where Nettie Ennis and John Bigelow attempted to drive across the railroad track.

Thus, it will be seen that by the pleading, it is

admitted that the carcass was on the right of way of the defendant company.

But, independently of these admissions, the proof shows this beyond doubt. Mr. Ennis testified that the carcass lay alongside the track about twenty-five feet from the track east of the driveway, which crossed the railroad track; that the carcass was not far from the traveled road; that it was about twelve or fourteen feet from the driveway on the right hand side.

And Mr. Hamilton testified that the carcass was about sixteen feet from the outside rail, and about twenty feet from the traveled portion of the roadway. (Tr. p. 128).

The carcass remained upon the premises of the defendant company from early in January until the accident occurred. Three efforts were made by the defendant company to dispose of the carcass by burning same, and through the joint action of the burning and the gnawing of animals, wild and domestic, it remained there with the skeleton intact and with the flesh adjacent to the ground emitting odors for more than a month—emitting odors of the most offensive character. These odors were so pronounced in type and offensive in character that they were alike objectionable to man and beast. This carcass, under the circumstances, was a public nuisance, and for injury due to its existence, the defendant railroad company became responsible.

Section 6162 of the Revised Codes of Montana provides:

“Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner, of any navigable lake, river, bay, stream, canal or basin, or any public park, square, street or highway, is a nuisance.”

Section 6163 of the Revised Codes of Montana provides:

“A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.”

“Depositing anything upon one’s own land, which emits an offensive or unwholesome smell, that floats over the lands of another, producing unreasonable annoyance or discomfort, or that it is productive of deleterious consequences, is an actionable nuisance, as manure, decayed vegetables, dead animals, or anything that produces injurious results in the manner named.”

Wood on Nuisances, 3rd ed., Sec. 115.

In the case of

City of Richmond v. Caruthers, 50 S. E. 265,
the court said:

“As long as property is not immediately dangerous or offensive, it cannot be treated as a nuisance per se. This principle is well illustrated by the law regarding the disposal of carcasses of dead animals. They are li-

able to become nuisances and if not cared for may be treated as such.”

And in the case of

Ellis v. Kansas City, etc. Ry. Co., 63 Mo. 131,
21 Am. Rep. 436,

the court said:

“The defendant in permitting the horse killed by its locomotive to remain on the side of the track so near the house occupied by plaintiff and her husband as to render her occupancy unwholesome, was guilty of a private nuisance, for which it rendered itself liable to an action by the person in possession of the house.”

We submit, then, that the existence of this carcass within a few feet of a traveled roadway used by the public generally and upon the premises of the defendant company constituted a nuisance and for the injuries occasioned by it, the company was responsible.

DEFENDANT'S NEGLIGENCE NOT A LEGAL CAUSE.

Under this heading, the doctrine of the last clear chance is invoked. By a strained process of reasoning, the distinguished counsel representing the plaintiff in error, reaches the conclusion that, although the company was negligent and although the company created this nuisance and continued same upon its property, because the defendant in error, Mrs. Ennis, knew this, and the driver Bigelow knew this, no recovery can be had. In other words, it is stated that they had the last clear chance; that they could travel some other road; that they could abate the nuisance or they could direct the section man to do this, and be-

cause they didn't do those things, the doctrine of the last clear chance can be successfully invoked against them; and this, it is said, on the authority of *Davis v. Mann*, 10 M. & W. 546, and *Butterfield v. Forester*, 11 East. 60, cited in appellant's brief. From the fact that the principle invoked, which we confess is novel, and illogical, finds foundation in the cases referred to, it may be well to ascertain at the outset what these cases hold.

In the case of *Davis v. Mann*, the defendant negligently drove a horse which he rode against an ass negligently left fettered on the highway. The doctrine was declared as follows:

"A plaintiff is not precluded from recovering for an injury negligently done by a defendant, by the fact that he himself has been guilty of unlawful or negligent conduct, unless he might, by the exercise of ordinary care at the time, have avoided the injury."

And in the case of *Butterfield v. Forester*, the plaintiff was thrown down while riding along a highway, by reason of encountering an obstruction which he might have seen and avoided. He was driving as fast as his horse would go through the streets of a town, and the evidence showed that if he used ordinary care, he would have seen the obstruction. The court held that the accident occurred entirely through his own fault, and, therefore, the action could not be maintained.

It will be noted that in the cases referred to, the defense was that of contributory negligence, and in its consideration, the doctrine of the last clear

chance did not arise. The doctrine of the last clear chance, as invoked, is invoked by the injured party rather than by the party who inflicts the injury. In the case of

Dahmer v. Northern Pacific Ry. Co., 48 Mont. 161, the Supreme Court of Montana considered this doctrine, using the following language:

“It may be remarked, however, that the rule is limited in its application to those cases only in which the plaintiff, or the person injured or his property, has by his own act been exposed to injury at the hands of the defendant, and the defendant, after discovering the situation of the person or property in time, has failed to use ordinary care to avert the injury. (1 Thompson on Negligence, sec. 228). A case calling for its application embodies three elements, viz: (1) The exposed condition brought about by the negligence of plaintiff or the person injured; (2) the actual discovery by the defendant of the perilous situation of the person or property, in time to avert injury; and (3) the failure of defendant thereafter to use ordinary care to avert the injury. All of these elements must concur, else the rule has no application, and liability must be predicated upon the failure of defendant to discharge toward the person injured or his property, some other duty imposed by the law under the facts of the particular case as they are made to appear. The duty imposed by it is, not to use ordinary care to discover the peril and also to avert the threatened injury, but to avert the injury after the perilous situation is actually discovered. It is nothing more than a qualification, by way of exception, to the general rule that negligence on the part of plaintiff which

proximately contributes to his injury will bar his recovery. So the rule is understood and applied by the courts generally.”

Reference in the brief of plaintiff in error is made to Cyc. Volumes 28, 29 and 37, where it is said cases will be found to sustain the contentions of counsel. If by that is meant that cases will be found, that contributory negligence on the part of the complainant will bar recovery except where the last clear chance doctrine applies, we readily assent. If, however, it is meant that cases will be found which in the instant case would impose a duty upon the defendants in error as a condition precedent to recovery that they should take a shovel and go upon defendant's premises and bury the carcass, or that they should make complaint to the railway company as to the disposition to be made of the carcass, or that they should go out of their way two or three miles so as not to use this roadway, or that they should hunt up the section foreman and have him bury the carcass, as suggested by plaintiff in error, then we emphatically dissent. We do so, recognizing fully the rule that if the conditions were such that Mr. Bigelow, as a reasonable man and in the exercise of reasonable care, should not use the crossing, the danger in doing so being imminent, no recovery could be had. In other words, in this case the proposition is presented as to whether the conditions were such as to make it rashness on the part of Mr. Bigelow to drive the team over this crossing.

If this is the case, then and in that event, and only in that event, should the verdict be set aside. Courts take judicial notice of the fact that horses shy at objects quite frequently, or to use the language used by the witnesses who testified in relation to the matter, "they get frightened." It does not necessarily follow because a horse gets frightened that the horse will run away. If unchecked and uncontrolled, a runaway might occur, but a driver through agencies under his control, in most cases, can prevent such an occurrence. Surely, counsel would not contend that in the case of a defect in a street, a pedestrian should thereupon, before using the street, remove the defect himself, or request the municipal authorities to do so, at the risk of not being able to recover should he be injured, when as a reasonable man he would be justified in thinking that he could safely use the street in its defective condition in safety to himself. Surely it will not be contended that one driving a team in a city, and seeing boxes negligently piled in front of a store on the sidewalk, and knowing that boxes so piled would have a tendency to frighten his horses, and knowing, likewise, that though his horses became frightened, he could easily check them, that the driver in such a case would be compelled to tie his team at some hitching post before reaching the boxes and go forward and remove them or ask the store-keeper to do so, or take some other street where these conditions would not confront him, at the as-

sumed risk of driving his team beyond the boxes. We may, then, borrowing a word from the learned counsel for the plaintiff in error, suggest, in the consideration of this proposition, that we remove from the discussion the “glamour” of the last clear chance, and consider the question presented as to whether, in using the roadway, the defendants in error were guilty of contributory negligence. Instructions covering this feature from the standpoint of the plaintiff in error were requested as follows:

“No. 2A. You are instructed that even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that, at the time of the runaway, the defendant railway company was absent, and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, if any, and had the last clear chance, by the exercise of reasonable care, to avoid such negligence, if any, and failed to do so, and hence even if said defendant was negligent as aforesaid, such negligence, if any was but a condition or circumstance of the runaway and not a proximate cause thereof and the death of the deceased was not proximately caused by such negligence if any.”

(Tr. p. 203.)

“No. 2B. You are instructed that, even if the proof discloses that the defendant company was negligent in any of the matters complained of, nevertheless the uncontradicted evidence establishes that, at the time of the runaway, the defendant Railway Com-

pany was absent, and that Dr. Ennis, one of the plaintiffs, and Jno. Bigelow, the driver, at the time of the runaway and for a long time prior thereto, discovered such negligence, or by the exercise of reasonable care might have discovered the same, and had the last clear chance, by the exercise of reasonable care, to avoid such negligence, if any, and failed to do so, and hence, even if said defendant was negligent, as aforesaid, such negligence, if any, was but a condition or circumstance of the runaway and not a proximate cause thereof, and the death of the deceased was not proximately caused by such negligence, if any."

(Tr. p. 203.)

"No. 2C. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place and then leaves that place, and is no longer present, and someone approaches such place and discovers, or by the exercise of reasonable diligence might have discovered, the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers, but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause, and in the occurrence of which its negligence was merely a condition or circumstance."

(Tr. p. 204.)

"No. 2D. Where, in any case, a defendant has negligently permitted dangerous conditions to exist at any place, and then leaves that place and is no longer present, and some-

one approaches such place and discovers the negligence of such defendant, and has the last clear chance, by the exercise of reasonable care, to avoid such negligence and fails to do so, then the negligence of such a defendant is in law deemed not a cause of such person being injured by such dangers, but a mere condition or circumstance in the chain of events leading to such injury, and such defendant is not liable for consequences of the occurrence of which its negligence was not a cause, and in the occurrence of which its negligence was merely a condition or circumstance.”

(Tr. p. 205.)

“No. 2E. Even if you find that the defendant railway company was negligent in any of the matters complained of, nevertheless you cannot return a verdict for the plaintiffs if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees knew, or discovered, or in the exercise of reasonable care should have known or discovered, said negligence, if any, of said defendant, and had the last clear chance to avoid the same and negligently failed to avoid the same. If such is the case, then the negligence, if any, of said defendant is in law but a condition surrounding the accident and not, in law, a proximate cause of the accident, for no one is after discovering, or having the means of discovering, that another has been negligent, entitled to thrust himself upon the negligence of another, or blindly refuse to discover the negligence of another, and if he does so, it is, in law, his own act or omission, and not the negligence of the defendant, which is the proximate cause of the injury.”

(Tr. p. 206.)

“No. 2F. If you find from the evidence that the defendant railway company placed, or negligently permitted to remain, at the place narrated in the complaint, the carcass of a horse so that it was an object likely to frighten horses driven upon the roadway in question, such negligence, if any, on the part of said defendant would not be a proximate cause of the runaway and of the damages, if any, caused by the death of the deceased, if you further find that the deceased, or the plaintiffs, or either of them, or any of his, her or their agents or employees knew of and discovered said negligence, if any, or by the exercise of reasonable care should have known or discovered the same, or had the last clear chance to avoid the same and negligently failed to do so. Under such circumstances the negligence, if any, of the defendant railway company would be a mere condition or circumstance of the runaway but not a cause thereof.”

(Tr. p. 207.)

These instructions were refused. The court's attention was directed to its omission to give these instructions by counsel for plaintiff in error as follows:

“Your Honor has limited the issue of contributory negligence to the manner of driving and has not charged the jury as to the duty of the driver or the plaintiffs in any way to avoid the alleged negligence of the defendant, not only in the manner of driving, but by using another road, or in any other respect. In fact, the Court charges the jury that the last clear chance doctrine as regards the plaintiffs' negligence, and any negligence of the driver, other than his manner of driving, may be laid aside.

By the Court: In the light of the testimony as to the use made of the road, I do not think the driver was bound to use another road, by placing the carcass there you cannot foreclose him from using that road.”

(Tr. p. 235.)

We have heretofore set out in detail the evidence on this point. Suffice it to say, that the evidence in behalf of the plaintiffs tended to show that the carcass, in the condition in which it was, was an object likely to frighten horses, and the testimony of the defendant tended to show that the carcass would not have any effect whatsoever upon the horses, and would, in no manner, tend to frighten them. This being the state of the evidence, the law did not require the user of the roadway to take some other road. He would only be required to do this, if, as a reasonable man, he should conclude that a runaway was likely to occur, and there is no evidence to justify this assumption. The most that Bigelow could expect was that the horses might shy or become frightened.

Thompson on Negligence, Sec. 6265,
declares the following rule:

“The doctrine under this head, found in most of the cases cited in the preceding sections, was well stated by the Supreme Court of Pennsylvania thus: ‘When a highway is obstructed, the passer along it is bound to the observance of ordinary care; that is, such care as a reasonably prudent man would exercise to preserve himself and property from injury,—just the same degree, but heightened

in intensity, as would be observed in ordinary circumstances.’ The rule is general, therefore, that a person having knowledge of a defect or obstruction is bound to use care according to the circumstances to avoid injury to himself or property. Accordingly, if the obstruction or defect in the highway is of such a nature that it would be consistent with reasonable care to attempt to pass by it, one using the highway is entitled to make the attempt.”

And in the case of

County Commissioners v. Burgess, 61 Md.
29,

it was held that because a traveller on a public road knowing that a bridge had a hole in it, and was unsafe his using same would not bar his right to recover, the court saying:

“In this case it does not appear from the proof that the bridge was wholly impassable. It was unsafe and had a hole in it, into which the appellee’s horse fell and was injured. The simple fact of its existence with the knowledge of the plaintiff was not sufficient to bar recovery. It should appear that the hole rendered the bridge practically impassable to effect a bar because of knowledge. The hole might possibly have been avoided with ordinary care in driving, and the knowledge of its existence ought to have prevented carelessness on the part of the plaintiff, and naturally would have induced care on his part, but the *onus* of showing that such care and prudence was not exercised still rested on the defendants.”

The doctrine invoked at the trial, as indicated by the instructions referred to, elaborated upon now, demanded that the driver should have taken

some other road, upon the principle that where there are two ways of doing a thing, one dangerous and the other safe, choosing the dangerous way constitutes contributory negligence.

Cyc. discusses this proposition under the heading "Choice between alternatives involving risks," Vol. 29, page 520. In the text the doctrine is stated as follows:

"If two ways are open to a person to use, one safe and the other *dangerous*, the choice of the dangerous way, with knowledge of the dangerous condition, constitutes contributory negligence." (Italics ours.)

Labatt on Master and Servant (1st Ed.) vol. 1, Sec. 333. discussing this principle in its application to the relation of master and servant uses the following language:

"The rule thus laid down is evidently intended to be applied only when the method adopted was essentially unsafe, and the other was apparently safe. It will be observed that this conception emerges more or less distinctly in the statements of the rule already given. That is determines, whether expressly adverted to or not, the actual extent and scope of the rule is apparent from the consideration that a doctrine which should predicate negligence, as a matter of law, in cases where the servant is merely chargeable with having adopted the less safe of two courses which were both reasonably safe, would contravene the fundamental principle by which the standard of due care is declared to be the hypothetical conduct of a prudent person under the given circumstances."

How can such a rule be invoked here? We re-

peat again what has been said before. The evidence showed that the carcass, at most, would only tend to frighten horses, while the plaintiff in error resolutely insisted that no such frightening could occur. It was a question, then, on this evidence as to whether using the road constituted contributory negligence. We most confidently assert that the defendants in error had the legal right to use the road exercising reasonable care in so doing, and that the learned trial court was justified in holding that there was no evidence to justify the submission to the jury of the question as to whether the defendants in error were guilty of contributory negligence in not taking some other road.

We fail to see the persuasive force of the case of the District of Columbia v. Moulton, 182 U. S. 576, cited in appellant's brief, as applied to the instant case. There the roller was lawfully on the street, and in connection with its presence there, the district was in no manner in default. The court said "The roller being lawfully on the street the district was not bound to guard against the consequences of the voluntary attempt to drive by the roller."

The City of San Francisco would not be liable for a runaway team taking fright at a street car. The street car would be lawfully on the street. What kinship can be established between a case of that kind and the instant case? In the instant case the carcass was not lawfully beside the road-

way. In the instant case we have the element of negligent conduct in leaving the carcass where it was until it became a public nuisance.

RULINGS OF EVIDENCE.

HABITUAL USE OF LIQUOR BY THE DRIVER.

An inspection of most of the citations in appellant's brief have to do with cases where this character of evidence would, undoubtedly, be admissible, as where the incompetency of a fellow servant is the subject of investigation. In such a case, it would be important to ascertain what knowledge the master had as to the incompetency of the servant. Indeed, in cases of that kind, the general reputation of the fellow servant as to drinking proclivities could properly be resorted to. It would be a question, in such a case, as to whether the master had knowledge of the fact that the servant was addicted to this habit.

As to the admissibility of this character of evidence generally, the Court of Appeals of the Sixth District, in the case of

Louisville & N. R. Co. v. M'Clish, 115 Fed. 268, has this to say:

"4. Another proposition is much discussed in the briefs, and was the subject of oral argument. It involves the right of the defendant company to introduce evidence tending to show that the deceased was in the habit of jumping on trains near the place where the body was found. In the form in which the offer of proof in this branch of the case was made it is quite likely that the question sought

to be made was so involved with incompetent matter proposed to be proven at the same time that the alleged error in ruling upon it has not been properly brought into the record. As it has been thoroughly discussed and may be an important question in a new trial of the case, we have concluded to give our views upon it. The learned counsel for plaintiff in error admit the general rule to be that testimony offered for the purpose of establishing contributory negligence of the deceased, like other testimony, must be limited to proving facts existing at the time of the happening of the injury complained of. It is contended, however, that when there is no eyewitness to the occurrence, and the manner of its happening is to be left to circumstantial evidence alone, it is competent to show the habit of the deceased in the respect of doing the thing which it is claimed he did at the time of receiving his injury. The argument is, proof of habit to do the thing in question renders it more likely that it was done at the time in controversy. There are not lacking authorities to support this view, but we think the better rule is that such testimony tends to raise collateral issues, to beget uncertainty and false inferences from events which have no bearing upon the real issues. A man may be careful upon one occasion and careless upon another. It is not fair deduction to say that because the deceased sometimes boarded trains in motion that, therefore, he was attempting to board a train when killed. Such testimony, tending to show contributory negligence, could be met with other testimony tending to show that such was not his habit, and the attention of the jury would be diverted from what happened on the occasion of the injury to the consideration of the character and habits of the deceased at other times.

We think the testimony should be confined to the conduct of the deceased in the particular instances under investigation in the light of the facts competent to be directly or circumstantially proved."

In the case of

Thompson v. Bowie, 4 Wall, 463,
the court said:

"All evidence must have relevancy to the question in issue, and tend to prove it. If not a link in the chain of proof, it is not properly receivable. Could the habit of Thomas F. Bowie to gamble, when drunk, legally tend to prove that he did gamble on the day the notes were executed? The general character and habits of Bowie were not fit subjects of inquiry in this suit for any purpose. The rules of law do not require the plaintiff to be prepared with proofs to meet such evidence. That Bowie gambled at other times, when in liquor, was surely no legal proof that because he was in liquor on the 1st day of January, 1857, he gambled with Steer. It is very rare that in civil suits the character of the party is admissible in evidence, and it is never permitted, unless the nature of the action involves or directly affects the general character of the party. 1 Greenl. Ev., Sec. 54. Bowie was not charged with fraud, nor with any action involving moral turpitude. He was simply endeavoring to show that his own negotiable paper was given for money lost at play; and to allow him, as tending to prove this, to give in evidence his habit to gamble when drunk, would overturn all the rules established for the investigation of truth."

Judge Thayer, in the case of

Harriman v. Palace Car Co., 85 Fed. 353,
uses the following language:

“When, therefore, a complaint does not charge incompetency, but simply alleges that an employe acted carelessly on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue.”

Indeed, we find from an inspection of the cases that where evidence of this kind is at all admitted, it is admitted where the transaction, which is the subject of investigation, rests entirely upon circumstantial evidence.

We quote as follows from *Encyclopædia of Evidence* on the subject of Intoxication, Vol. 7, pages 778-779:

“Evidence of other instances of intoxication is inadmissible upon the question as to whether the party was intoxicated at the time alleged. So in actions for personal injuries where contributory negligence is alleged as a defense testimony relating to the injured party’s habits as to temperance and sobriety is incompetent to show the probability of his being intoxicated at the time of the injury. Nor is evidence of intemperate habits or of the previous use of intoxicating liquors on the part of the party causing or contributing to the injury admissible on the question of his intoxication at the time. But evidence of intoxication at the time of the injury is always admissible on the question of contributory negligence. And where the intoxication at the time is admitted, plaintiff cannot prove his reputation for sobriety in rebuttal.

* * *

The fact of habitual drunkenness raises no presumption that at the time of the doing of the act the person was intoxicated.”

The language of the text is sustained by the references in the notes.

In the case of

Shelly v. Brunswick Traction Co., 48 Atl. 562, where this character of evidence was excluded, the court said:

“All of these questions were objected to and excluded, and exceptions taken. The evidence was not relevant. To prove that the plaintiff was intoxicated on previous occasions, or as the defendant’s counsel puts it in his brief, was addicted to the use of intoxicating liquors, would not prove that he was intoxicated at the time of the accident, and to show that on previous occasions of intoxication he was in a helpless condition would not tend to show that on the occasion in question he was intoxicated to such a degree as to be helpless. It has come to be generally accepted that the character of a party in a civil cause cannot be looked to as evidence that he did or did not do an act charged.”

And in the case of

Kingston v. Ft. Wayne & E. Ry. Co., 70 N. W. 315,

the court said, approving the doctrine announced in the case of Williams v. Edmunds, 75 Mich. 92:

“It was held that it was proper to show whether the servant who was alleged to have committed the injury was or was not sober at the time the injury was committed, it being a part of the *res gestae*, but that it was not proper to show his intoxication at other times, as it was raising a collateral issue.” (Citing a large number of cases.)

As sustaining this doctrine, see, likewise:

Hubbard v. Inc. Town of Mason City, 14 N. W. 772;

Hill v. Snyder, 6 N. W. 674:

Langworthy v. Township of Green, 50 N. W. 130;

Lane v. Missouri Pac. Ry. Co., 33 S. W. 645.

In the instant case, we have witnesses testifying as to the condition of Bigelow. Some of those witnesses testified for the plaintiff and some of those witnesses testified for the defendant. This being true, we submit that the habits of the driver were too remote.

We submit, however, that even though this evidence was competent, there is enough of same in the record without contradiction, so that the plaintiff in error has suffered no injury on account of the portions excluded. Mr. Ennis testified upon cross-examination that Bigelow was a man who drank occasionally. (Tr. p. 78). Bigelow himself on cross-examination testified that he was a drinking man, but didn't drink intoxicating liquors prior to that time to excess. (Tr. p. 73). Mrs. Katie Meinhardt on cross-examination testified that the general reputation of Mr. Bigelow was that he drank to excess at times. (Tr. p. 111).

This evidence is in the record without contradiction, and there at the instance of the plaintiff in error. It might be pertinent to remark, too, that in the offers of proof, for the exclusion of which complaint is made, there is no suggestion that even though Mr. Bigelow was under the influence of liquor at the time of the runaway, his condition had anything to do with his inability to check or control the team. In order to make the

evidence available, it should be shown that the condition of the driver, by reason of being intoxicated, had something to do with the accident. It is elementary law that contributory negligence must, in some manner, conduce to the injury complained of.

We insist, however, that the evidence was inadmissible, and that the portions as to which complaint is made were properly excluded.

THE DRIVER'S INCONSISTENT STATEMENTS.

Under this heading counsel contends:

(a) That the deposition of the driver taken at the former trial should not be admitted;

(b) That although counsel, on the former trial, expressly disavowed any intention to impeach the witness in putting the question which was put, he should be permitted to withdraw disclaimer and impeach the witness, regardless of the fact that no impeaching questions were put to the witness;

(c) That the statements of Bigelow made at any time in reference to the runaway could be shown, and that the rule of hearsay evidence didn't apply to them;

(d) That the right existed on his part to withdraw the questions that were put to Bigelow on cross-examination.

This, we believe, is a summary of the contentions under this heading. Before taking them up we desire to detail the facts which bring up for consideration these legal propositions:

The record shows in connection with the use of Bigelow's testimony the following:

"Thereupon it was stipulated between the parties that the driver Bigelow was not now in the State of Montana, and was probably in the State of South Dakota, and that the transcript was a true transcript of what the witness Bigelow testified to at the former trial.

Thereupon counsel for the plaintiffs offered to read said transcript of the testimony of said driver Bigelow, but the defendant objected thereto, on the ground that the testimony constitutes mere hearsay, and the witness himself must be called, and the inability to call him has not been sufficiently established, and on the further ground that at the time of the examination of the witness Bigelow at the last trial the defendant did not have impeaching testimony, and accordingly the witness was asked in the course of his examination in regard to impeaching testimony for the purpose of ascertaining whether any impeaching testimony would be available, and whether he would admit that impeaching testimony existed; but since the last trial the defendant has secured impeaching testimony and also upon the ground that the testimony of the witness as disclosed in the transcript is too unintelligible and uncertain to be understood, in that the witness referred in his testimony to a plat, and indicated the places referred to on the plat by such expressions as 'here' and 'there,' pointing to the plat, and the meaning of such references are now lost.

Which objections were by the court overruled. To which ruling of the court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

(Tr. pp. 81-82).

Upon cross-examination, the witness testified as follows:

“Do you remember at any time—or did you at any time state to anyone at any place that it was this piece of paper which caused this runaway, and not this carcass?”

By General Nolan: I object to that. This is a witness in the case, and I suppose if there is some evidence it was made in some particular statement.

By the Court: Sustained.

By Mr. Veazey: We are not laying the foundation for impeachment, but are inquiring for evidence.

By General Nolan: Well, then, if you are not, the testimony is incompetent. Of course, any statements made by this man would be hearsay, except in so far as this statement would be contradictory to anything he has said on the stand here.

By the Court: I will allow him to answer the question.

Q. Did you ever at any time or at any place make any statements to anyone to the effect that this runaway had been caused by the horses becoming frightened at the piece of paper, and not by the carcass?

A. No, sir.”

(Tr. p. 93).

In the instant trial the following proceedings took place:

“Before the first question above set forth, beginning with the words, ‘Do you remember at any time, or did you at any time,’ etc., was read, counsel for the defendant advised the Court that defendant desired to withdraw said question, and to waive it, and advised the Court that if the witness were present, an impeaching question would be propounded, since impeaching testimony was not available

and defendant demanded that the witness be produced, in order that an impeaching question might be propounded, but the court declined to allow said question to be withdrawn, or the answer thereto to be withdrawn. To which ruling of the court defendant, by its counsel, then and there duly excepted; which said exception was thereupon noted and allowed. And the court likewise overruled the demand of the defendant that said witness be produced. To which ruling of the court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed.

Likewise when that part of said transcript containing the objection to said question and the court's ruling sustaining the said objection, and the declaration by counsel for the defendant that defendant was not laying the foundation for impeachment, but was inquiring for impeaching evidence, was read, counsel for defendant advised the court that defendant desired to withdraw said disclaimer that it was not laying the foundation for impeachment, and counsel stated that, at the time of the former trial, the defendant did not have any impeaching testimony, and was forced to inquire of the witness as to whether there was any, and could not call his attention to any particular statement or impeaching testimony, but that since then impeaching testimony had been procured, and defendant desired, therefore, to withdraw said disclaimer and to impeach the witness.

By the Court: The court will not permit it. Now, we will hear what the witness has to say and bring that up later.

To which ruling of the court the defendant, by its counsel, then and there duly excepted; which said exception was thereupon duly noted and allowed."

(Tr. pp. 94-95).

(a) AS TO THE ADMISSIBILITY OF THE TESTIMONY
TAKEN AT THE FORMER TRIAL.

It is contended that before this testimony was admissible, it was incumbent upon the plaintiff, not only to show that the witness was beyond the state, but that his absence was permanent and indefinite.

Section 7887 of the Revised Codes of Montana provides as follows:

“In conformity with the preceding provisions, evidence may be given upon a trial of the following facts:

* * *

8. The testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties relating to the same matter.”

In the case of

Chicago, St. P. M. & O. Ry. Co. v. Myers, 80
Fed. 361,

Judge Thayer of the Eight Circuit Court of Appeals, considering this matter, said:

“The defendant company assigns for error that the trial court wrongfully excluded a stenographic report of the testimony of a witness by the name of Moses R. Dickey, which had been given on a former trial of the case, after the defendant company had shown that the said Dickey was a resident of the state of Ohio, and that the defendant had been unable to procure his attendance at the second trial. The rule appears to be established in Minnesota—where this case was tried—that such testimony is admissible. Minneapolis Mill Co. v. Minneapolis & St. L. Ry. Co., 51 Minn. 304, 53 N. W. 639; King v. McCarthy, 54 Minn. 190, 55 N. W. 960. And the same rule, it seems,

prevails in some other jurisdictions. *Railway Co. v. Elkins*, 39 Neb. 480, 58 N. W. 164, and cases there cited. We can see no substantial objection to the admission of such testimony when, on the first trial, the witness was fully examined and cross-examined, provided, always, that the stenographic report of his testimony is proven to the satisfaction of the trial court to be correct by the person by whom it was reported, and provided further that the witness is beyond the reach of the process of the court, and his personal attendance cannot be secured. Such testimony, we think, may very properly be accorded the same weight as a deposition duly taken on notice."

Professor Wigmore, discussing this question in his admirable work, and commenting on the requirements which are demanded by a few courts whose decisions are cited in the brief of plaintiff in error, says:

"Where the witness is out of the jurisdiction, it is impossible to compel his attendance, because the process of the trial court is of no force without the jurisdiction, and the party desiring his testimony is therefore helpless. Three conditions, however, have been by some courts suggested as essential in order that the present testimony may be regarded as unavailable in the fullest sense:

(a) The absence, it is sometimes said, must be by way of *residence*, not merely of temporary sojourn, because otherwise the trial could be postponed until his return. This, however, seems too strict a rule; by his absence he is at the time actually unavailable, no matter when he is to return; and, if the witness is not of such importance as to require a postponement until his return, still more if the opponent does not desire or con-

sent to a postponement, there is no reason for distinguishing between temporary and permanent absence.

(b) It is sometimes said that an effort should have been made to *persuade the witness* voluntary attendance; and no doubt the trial court's discretion might occasionally make such a requirement; but it is unnecessary to prescribe this as a general rule.

(c) It has also been suggested that an effort should have been made to obtain the *witness' deposition by commission*; but this is futile, for a deposition is no better than his former testimony.

This ground of admission, then (absence from the jurisdiction of trial), is generally accepted for *testimony at a former trial*; a few courts, following an early New York ruling, refuse to recognize it at all; a few others refuse to recognize it in criminal cases particularly."

(Sec. 1404).

In Vol. 5, Encyclopaedia of Evidence, page 904, the rule is announced as follows:

"The absence of a former witness from the state is sufficient ground for admitting proof of his former testimony."

And in support of this rule references are made to the following states:

Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana Code of Civil Procedure, *supra*, Nebraska, New Mexico, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Utah and Vermont.

In the case of

Atchison Ry. Co. v. Osborn, 91 Am. St. Rep.
189,

the court said:

“At the second trial, the testimony of three persons who had testified on the first was offered by the railroad company and was rejected; and this ruling is the principal error assigned for reversal by the company, which was again the losing party.

It was shown that the witnesses were beyond the jurisdiction of the court and the reach of its process, and that one of them resided in another state. It was agreed that the persons referred to were called as witnesses on the former trial, that they were examined by defendant and cross-examined by plaintiff, and that their testimony was taken down by the official stenographer, who appeared with the same ready to testify, and that he was then able to read the notes and would testify that they were correct. The offered testimony was unquestionably material and pertinent to the issues in the case, and we think it should have been received. Under the general doctrine governing the admission of such testimony, it was early decided that the testimony of a deceased witness upon a former trial between the same parties was admissible, and that it was not necessary to give the exact words of the witness, but it was sufficient to prove the substance of such testimony: *Gannon v. Stevens*, 13 Kan. 447; *Solomon R. R. Co. v. Jones*, 34 Kan. 443, 8 Pac. 730. The rule was upheld in a criminal case, wherein the personal presence of the witness is of great importance: *State v. Wilson*, 24 Kan. 189, 36 Am. Rep. 257. It was there held that the admissibility of the testimony depended upon two essentials—one, that it was given in a judicial proceeding between the same parties, upon the same subject of inquiry; and the other, that there was

opportunity and power to cross-examine. As an authority, the court cited 1 Greenleaf on Evidence, Sec. 163, where the learned author holds that the rule as to deceased witnesses is equally applicable to witnesses who are outside the jurisdiction of the court and out of the reach of its process. The rule laid down by Greenleaf was recognized in the case of *Gilmore v. Butts*, 61 Kan. 315, 59 Pac. 645, where the court had under consideration the admission of a copy of a lost deposition. It was there said that 'the trend of modern authorities is to the effect that if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane, sick, or unable to testify, or has been subpoenaed but appears to have been kept away by the adverse party, his testimony given at a former trial may be received.'

The supreme court of Michigan holds that a witness who is beyond the jurisdiction of the court is, to all intents and purposes, so far as the parties to the litigation are concerned, legally dead. The process of the court can no more reach him, and the parties can no more avail themselves of his personal presence than if he were, in fact, dead: *Howard v. Patrick*, 38 Mich. 795. While there is some diversity of judicial opinion as to the admissibility of testimony given by a witness on a former trial, the great weight of authority, we think, sustains the Greenleaf rule."

To this last mentioned case, there is appended a note giving a large number of cases which hold that absence from the state alone is sufficient to admit the testimony.

We submit, however, that this matter is settled by the provisions of the Montana statute, *supra*, and that the stipulation admitting that the witness

was beyond the jurisdiction of the state rendered the testimony admissible.

(b) RIGHT TO IMPEACH WITHOUT PUTTING IMPEACHING QUESTION.

As heretofore noted, when Mr. Bigelow was examined on the first trial, Judge Rasch then presiding, proceedings took place as heretofore set forth.

Section 8022 of the Revised Codes of Montana provides:

"The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony, as provided in Section 8025."

Section 8025 provides:

"A witness may also be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

These sections have been considered by the Supreme Court of Montana in a number of cases.

In the case of

State v. O'Brien, 18 Mont. 9,

the court said:

"No authorities are needed further than the statute itself. It is but the expression of the reason of judicial decisions for years and

years. By disregarding its requirements, well established principles of the law of cross-examination were violated.”

In the case of the

State v. Burrell, 27 Mont. 285,
the court said;

“Owing to the frequency with which able counsel raise the point, and contend for it in this court, that when, on cross-examination, a witness is asked if he has not at other times made statements inconsistent with his present testimony, he must have related to him, before an answer is required, the circumstances of time, place and persons present, we find it now proper to say that it is not always necessary to make such relation to the witness. If such a question be asked without reference to such circumstances, the question is proper. If, in answer to a question so put, he deny that he has made any inconsistent statements, or says that he does not remember, that ends the matter; and he cannot be impeached by production of evidence that he has done so, for the reason that a proper foundation for such impeaching evidence has not been laid. (Section 3380, Code of Civil Procedure.) Before such evidence may be introduced to contradict him, common justice and ordinary fairness demand that he have his memory aided by such relation of such circumstances, and that he be allowed to tell and explain exactly what he did say, if he said anything apparently or at all inconsistent at other times. If counsel intend to go further, and to bring in evidence of such inconsistent statements, if the witness deny them or say he does not remember, then, and only then, is it necessary to lay such a foundation.”

In the case of

Tague v. John Caplice Co., 28 Mont., 61,

the court said:

“An offer was made by defendant to prove the substance of a conversation had between Mr. Heslet, the then president of the defendant company, and the plaintiff to this action, and, had the proper foundation been laid, the evidence would have been admissible and material, as tending to contradict the plaintiff’s theory of the case, and possibly discredit the plaintiff himself; but it was clearly impeaching evidence, and the offer did not fix the time when the alleged conversation occurred or designate the persons who were present at the time, neither was the statement contained in the offer related to the plaintiff when he was on the witness stand, and the proffered testimony was therefore properly excluded.”

This, however, seems to be the rule generally recognized. Thompson on Trials, Section 502, lays down the rule as follows:

“The question propounded to a witness on cross-examination for the purpose of laying ground to impeach him by proof of contradictory statements out of court, must clearly state the *time, when*, the *place where* and the *person to whom* the statements were made.”

And in the case of

Sinkler vs. Siljan, 68 Pac. 1024.

the Supreme Court of California said:

“There were rulings on the admission of certain testimony that were prejudicial to plaintiff. When Bjornstad was testifying he was not asked as to any conversations with other persons since the transfer of the note to plaintiff, or as to any statements made by him to any one, relative to the note or his ownership or transfer of it. Defendant was in Grafton, N. D., in the fall of 1900, some time after the transfer of the note. He and

Bjornstad met, and had some talk about a settlement and defendant testified: 'I told him (Bjornstad) that he would have to call this note back, and that that is the only way we could settle it. Then he said 'if you will loan me \$500, I will give the note back. You will get the note back.' Witness Euchane testified to a conversation he had at Grafton with Bjornstad in October, 1900. He testified: 'We got to talking, and he asked me if I was going back to Nome this summer, and I said I might go, and so he wanted me to find out how much Siljan could take out this summer. He had a note against him for \$3,000.' There were other statements of Bjornstad testified to by other witnesses on other matters, introduced as inconsistent with his testimony, and as to which his attention was not called when testifying. Timely objection was properly made to all this evidence, and exceptions reserved. This testimony was in violation of section 2052 of the Code of Civil Procedure. If it were admissible to show that Bjornstad had made statements, since the transfer of the note, tending to discredit plaintiff's title as indorsee and to show that the payee indorser still held the note, which, in any event, could only be done to impeach Bjornstad's testimony, the statements should have been related to him 'with the circumstances of the times, places and persons present,' and he should have been 'asked whether he made such statements, and, if so, allowed to explain them'; and this is generally the rule whether the declarations of the witness are offered for the purpose of impairing the force of his testimony, or are offered as contradictory statements for the same purpose. In either case an opportunity should be given the witness to explain what he said. These statements of plaintiff's assignor bore directly on a material issue before the jury, and could not have failed to

impair not only Bjornstad's testimony, but that of plaintiff himself, and probably had a direct influence in leading the jury to disregard the positive instruction of the court to find for the plaintiff, and were necessarily prejudicial."

Indeed, if Mr. Bigelow was present testifying, and with the question which was put to him now under consideration, general in its nature, impeaching evidence could not be introduced to show that he made the statement which it is claimed he did to the witness Gardner.

As was stated by the Supreme Court of Montana in the Burrell case, *supra*, the answer made to such a general question was controlling and final. It was the misfortune of the plaintiff in error that at the time that Bigelow was examined, it was without information as to this alleged conversation with Mr. Gardner. When the instant trial took place, the plaintiff in error was in the possession of information about this conversation. It could have taken the deposition of Mr. Bigelow, so that the proper foundation might be laid, or it could have, undoubtedly, secured a continuance until either the presence of Mr. Bigelow might be secured or his deposition taken. As stated by the learned trial judge, cases are lost and won because important evidence cannot be produced. Suppose, however, that the court permitted this impeaching evidence, in what situation would the defendants in error be placed? They would not be in a situation to rebut such evidence. The

learned counsel for the plaintiff in error with jaundiced vision can only see one side.

We respectfully insist that there is no warrant, in reason or in law, for entertaining the demands and requests which were made to suppress this testimony or permit the impeaching testimony which was offered.

But, suppose for the sake of argument, that the plaintiff in error was allowed to place Mr. Gardner upon the stand. How was Mr. Bigelow to be impeached? Mr. Gardner and Mr. Bigelow conversed about this matter, so it is said, but Mr. Gardner could not rememmber what Mr. Bigelow said to him. We desire, however, to let the record speak:

“I reside at Lakeside, Montana. I was acquainted with John Bigelow prior to the accident in question. I talked with him in regard to the accident on Mr. Hennessey's place in the granary. I first met John Bigelow eight years ago this spring. I do not remember what the substance of that conversation was. I know we were talking about this case, but I don't know what the substance of the conversation was. I do not remember what he said at that time in regard to how the accident happened. I remember talking with Dr. Brockman in regard to the accident.

Q. Do you remember telling him what Bigelow told you in regard to the accident?

By Col. Nolan: We object to that as immaterial, whether he does or not. It is hearsay evidence of the rankest kind. If he did, seemingly he told him something he did not know anything about.

By the Court: I presume you are approaching impeachment.

By Mr. Veazey: Not entirely. It might be considered impeachment in one sense, but it might be considered as substantive evidence. That is, it might be considered as a declaration made by a person who would be responsible for the runaway, in which event it is a declaration made by a person whose duty is in question in this case. The duty of the driver as a third person is a question in dispute in this case, and therefore, whatever, would be evidence for or against the driver is evidence between the parties to this case.

By the Court: I don't understand it so. You might bring in the statements of servants. That happens every day. It might be admissible for impeachment if the plaintiffs propose to let it go in for that purpose.

By Mr. Veazey: I have in mind also the question that was put to Bigelow in his deposition. We advised the court at the time the testimony of Bigelow was being read, that at the time Bigelow testified, we had no impeaching testimony, and at the time his testimony was read we withdrew the disclaimer that the question was not asked Bigelow for the purposes of impeachment.

By the Court: You disclaimed any intention to impeach Bigelow when you put to him a question which was not a proper impeaching question. When you ask a witness if he made a statement you must ask him the time and the place and the person in whose presence it was made. You expressly said it was not for the purpose of impeachment. It is your misfortune that you did not have the impeaching testimony at the time Bigelow testified. It is no fault of the other side. Even the best cases are sometimes lost because testimony cannot be produced. The objection will be sustained.

To which ruling of the court the defendant, by its counsel, then and there duly excepted;

which said exception was thereupon duly noted and allowed.

By Mr. Veazey: We now desire to renew our objection and exception to the reading of the testimony of Bigelow, as taken at the last trial, on the ground that its admission with the rulings of the court forecloses us from introducing impeaching testimony, and the ruling of the court requiring us to stand by our disclaimer after we withdraw it, and compelling us to have read in the evidence the impeaching question propounded to Bigelow, with the disclaimer, and then not permitting us now to withdraw the disclaimer, and introduce the impeaching testimony, is prejudicial to the defendant. Which said exception was thereupon noted and allowed.

Thereupon the defendant made an offer of proof in writing, as follows:

We offer to prove by the witness now on the stand that he talked to Bigelow in regard to the cause of the accident, but that the conversation occurred so long ago that he does not remember the substance of that conversation; that the witness does, however, remember that thereafter he talked with Dr. Brockman and told Dr. Brockman what Bigelow had told him (the witness) in regard to the accident. We offer further to prove by the witness that he told Dr. Brockman only the truth in regard to what Bigelow told him (the witness).

This testimony is offered for the purpose of impeaching Bigelow in the first place. Secondly, and separately, as an admission by the driver, as one whose duty in this case is in question, and therefore, as a declaration or admission made by the driver would be admissible for or against him, it would be admissible for or against the plaintiffs to this case, and in connection with this offer of proof an offer will hereafter be made through Dr. Brockman, now in court, to prove that

that conversation, that Gardner had with Dr. Brockman, was to the effect that Bigelow told Gardner that the runaway was caused by the horses becoming frightened at a piece of paper, and not by the carcass. This will connect up the proof and avoid any possible hearsay objection whatever, in that the conversation or statement of Gardner is under oath to the effect that he had a conversation and reported it correctly to Brockman, and Brockman, under oath, states what Gardner said."

(Tr. pp. 132-135).

Dr. Brockman was called and he testified as follows:

"I reside at Polson, Montana. I used to reside at Lakeside, at the time of the accident to Mrs. Ennis, on a homestead there. I know William Gardner. I talked with him in regard to the Ennis accident.

By Col. Nolan: You want to ask this witness if Gardner didn't tell him something.

By Mr. Veazey: Yes.

Thereupon the defendant offered in writing to prove by the witness now on the stand (Dr. Brockman) that shortly after the accident he had a conversation with the witness Gardner, in which Gardner discussed the accident and the cause thereof, and told the witness that Bigelow had told him (Gardner) that it was a piece of paper that scared the horses and caused them to run away, and not the carcass.

By Col. Nolan: I object to that as incompetent and hearsay.

By the Court: Objection sustained. Do you contend that there is any possible legal basis upon which that evidence would be proper?

By Mr. Veazey: Yes, but your honor has

ruled that you do not desire argument. I will submit it to your honor at another time."

(Tr. pp. 162-163).

If, as counsel suggests, the testimony of Mr. Gardner was intended to impeach Mr. Bigelow, it could only be done by splicing Dr. Brockman on to Mr. Gardner. In other words, it would be a case where Mr. Gardner had a conversation with Mr. Bigelow, but could not remember what Mr. Bigelow said to him. He could, however, testify that about that time he had a conversation with Dr. Brockman and he told Dr. Brockman what Mr. Bigelow had told him, and Dr. Brockman would testify to what Mr. Gardner said Mr. Bigelow told him. Hearsay evidence carried to the second degree.

Supposing, however, that Mr. Gardner should be treated as a hostile witness, and that Dr. Brockman should be considered competent for the purpose of impeaching Mr. Gardner. Of course, no suggestion is made that the evidence of Dr. Brockman was offered for that purpose. In what situation do we find ourselves? Mr. Gardner had testified to nothing, and, therefore, his impeachment could not be effected, and if Dr. Brockman were permitted to say that Gardner made the statement to him, as alleged, that would be no evidence at all that such a statement was made by Mr. Bigelow to Mr. Gardner.

It is also urged that by section 7868 of the Revised Codes of Montana, any statement made by Bigelow at any time was *prima facie* evidence,

and was admissible as if made by a party to the action. The section referred to appears in appellant's brief and is as follows:

"And where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is *prima facie* evidence between the parties."

If the meaning is to be given to this section which counsel contends for, then, in all negligence cases, where the relation of master and servant exists, the statement of the servant, whose negligent conduct caused the injury, made at any time would be binding upon the master, and such statement related by a third person would be primary evidence against the master. In the case of a railroad corporation, a derailment occurring through the negligence of an engineer or brakeman, if this section covers the field contended for, then the statement of such brakeman or engineer made at any time to any third person as to how the derailment occurred could be detailed by such third person. No authority is cited by counsel in support of this principle and we venture the suggestion that none can be found.

California has the same statute, and although it has been in existence in that state since 1874 (Sec. 1851), we find that only in five cases has the statute been considered, and then on matters entirely foreign to the present contention. We have reference to the following cases:

Butte County v. Morgan, 18 Pac. 115;
McGorry v. Robinson, 67 Pac. 279;

Western Union Oil Co. v. Newlove, 79 Pac.
542;
Greve v. Echo Oil Co., 96 Pac. 904;
Northwestern Redwood Co. v. Dicken, 110
Pac. 591.

We respectfully submit that Mr. Bigelow's statements made to third persons and as a narrative of how the runaway occurred, in the absence of the parties to the action was hearsay evidence.

**WITHDRAWAL OF PORTIONS OF CROSS-
EXAMINATION OF MRS. CHARLES
ALLISON.**

Depositions were taken by the defendants in error for use upon the trial of the case. These depositions were taken pursuant to a stipulation reading as follows:

"It is hereby stipulated that the depositions of Mrs. Charles Allison, formerly Miss Alma Hanson, Katy Meinhardt, Charles Conwell, R. H. Sweetman, Charley Johnson, Charles N. Bain, John Lundquist and Fred Swan may be taken before William Powers, a United States Commissioner and notary public, at Bainville, Montana, and that, when taken, the said depositions may be used on the trial of said action, subject to the same objections, except as to form of interrogatives, as if said witnesses were personally present and testifying upon the trial of said cause, and that said depositions may be taken in shorthand and transcribed into typewriting, and, when so transcribed, shall be received by said parties and used as true and correct copy of said testimony given at said hearing, and both parties to this stipulation waive the signing of the depositions by the witnesses, subject to all ob-

jections except as to form, and subject to any rights reserved in this stipulation.”
(Tr. pp. 199-200).

Mrs. Allison’s deposition was taken (Tr. p. 98), and upon her direct examination and without objection she testified as follows:

“As regards whether I noticed the condition of Mr. Bigelow at the time he came up to the house to get me on that day, as to his being sober, or under the influence of liquor, he was perfectly sober as far as I could see. He was very much excited at the time he came to tell me about it.”

(Tr. p. 100).

As the deposition was read, when the cross-examination was reached the following occurred:

“Thereupon, upon the defendant objecting to the following portion of said deposition, the same was first read to and passed upon by the court, to-wit:

Q. Did Mrs. Ennis say anything to you at the time about his having had any liquor, or anything like that?

A. No, she did not.

Q. Did she say anything after the accident about his having had any liquor?

A. No, sir.

The defendant objected to said questions and answers, on the ground that the defendant had waived the cross-examination, and that therefore none of said cross-examination should be read in evidence, and in so far as the cross-examination has been admitted in evidence, this portion is a cross-examination as to a matter concerning which the defendant was forced to enter into, by reason of the improper questions asked in the direct examination, there being at the time the deposition was taken no one present who could rule on

the competency of said testimony, and said questions in the cross-examination were asked merely for the purpose of developing anything that might have been said, or that is pretended to have been said by Mrs. Ennis, seeking to sound the reliability of the witness' testimony as regards the alleged conversations with Mrs. Ennis, and said cross-examination now becomes at most direct examination, and the portion referred to is hearsay and incompetent, and does not come within any exception to the hearsay rule.

Which said objection was by the court overruled. To which ruling of the court the defendant, by its counsel, then and there duly excepted."

(Tr. pp. 102-103).

And as the reading of the cross-examination continued, the following occurred:

"Q. And during those conversations did she say to you anything about Mr. Bigelow having been drinking that day?

Which said question was objected to for the reasons stated in the last objection.

Which said objection was by the court overruled.

To which ruling of the court the defendant by its counsel then and there duly excepted; which said exception was thereupon duly noted and allowed."

(Tr. p. 103).

In the first place, referring to the suggestion that in the taking of the depositions no person was present who could rule on the competency after testimony, the best answer to this is that under the stipulation objections could be made when the depositions were read. When the direct testimony

was read question and answer, no objection was then made to the testimony.

It is contended that the court erred in the particulars referred to. The consideration of these alleged errors, likewise, presents for consideration the alleged error because of the refusal of the court to permit the withdrawal of the Bigelow question.

In the next place the depositions were the depositions of the defendants in error. Under the authorities which plaintiff in error cites the defendants in error had an absolute and unqualified right to use the entire deposition. Controversies have sometimes arisen as to the right of a defendant to use depositions taken by the plaintiff, when plaintiff elects not to use same, and controversies have sometimes arisen as to the right of litigants to use portions of depositions. Whatever may be the holding of courts regarding these matters, we find no decision which would prevent the plaintiffs from using the depositions taken by them, and by deposition we mean the deposition in its entirety, direct examination and cross-examination. It is true that under stipulations, objections upon their use at the trial could be urged as if the witnesses were testifying at the trial, except as to the form of the interrogatories. Would it be contended for a moment that if these questions were put to the witnesses orally at the trial, answers elicited, and upon reflection finding that the answers weren't satisfactory, that counsel

would be at liberty to withdraw this evidence? The question answers itself. The questions put to the witness were proper questions, and were not objected to. They became a part of the deposition, and if there was anything in the answers helpful to the defendants in error, it was their right to enjoy the resultant benefit.

Cyc, as to the use of depositions, Vol. 13, page 979,

declares the rule to be as follows:

“A valid and competent deposition taken and filed in the cause is the common property of the litigants therein, and either is entitled to use it. Especially is this so where the deposition is taken on interrogatories propounded by both parties. And while the use of a deposition by the adverse party is somewhat a matter of practice, and governed in most instances by statute or rules of court, yet it may be stated as a general rule that where a deposition has been taken by one party and filed in the cause his adversary is entitled to use it in evidence, although the first party refuses to introduce it in his own behalf; and even where there is a subsequent trial of a former action the deposition may be again introduced in evidence at latter trial.”

With much stronger reason may it be urged that the party taking the deposition is entitled to use same.

In the case of

Memphis & C. Packet Co. v. Pikey, 40 N. E. 527,

the court used the following language:

“Appellee on the trial, read to the jury the depositions of three witnesses, taken by her.

When appellee was about to read the cross-examination appellant objected, stating to the court, as the reason therefor: 'That the cross-examination was testimony for defendant, and as such is controlled by the defendant, the same as if the witnesses had testified from the stand, and defendant had refused to cross-examine them. It is optional with the defendant to have the cross-examination of the witness read to the jury.' This objection the court overruled, and permitted the cross-examination of the witnesses to be read to the jury. This ruling of the court below was correct. The depositions had been taken on behalf of appellee. Appellant had attended the taking of the depositions, and cross-examined the witnesses, and could no more prevent, by objection, the cross-examination being read at the trial, than it could ask the court to strike out and direct the jury to disregard evidence given on cross-examination of a witness at the trial of the cause.

We refrain, however, from prosecuting this discussion further, for, as already stated, the principles which we are here declaring are the principles which are recognized by the courts whose decisions are so plentifully cited on this topic in the brief of plaintiff in error.

EXCESSIVE VERDICT.

Although under the practice prevailing, this court is foreclosed from considering this question, nevertheless it is presented for consideration.

Baltimore & O. R. Co. v. Smith, 222 Fed. 667.

We quote as follows from the case of
Williamson v. Osenton, 220 Fed. 653.

“In such an action for damages this court cannot review the action of the District Court in refusing to grant a new trial for excess in the verdict. The provision of the seventh amendment of the Constitution that ‘no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law,’ was held in *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732, to deny to a federal appellate court that power. *N. Y. C. & H. R. R. Co. v. Fra-loff*, 100 U. S. 24, 25, L. Ed. 531; *Blitz v. United States*, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725. There is no more salutary judicial power than that of relieving against excessive verdicts. With the changes which modern life has brought, the importance of the exercise of the power with moderation and firmness becomes more and more important, especially when it is considered that the refusal of the trial court to give relief cannot be reviewed. Large as this verdict is, the motion to reduce by granting a new trial nisi was in the discretion of the District Court and beyond the consideration of this court.”

We have examined the cases cited in appellant’s brief. In nearly every instance the measure of compensation is the pecuniary loss sustained on account of deprivation of services. In addition to deprivation of services, in Montana the loss of comfort, society and companionship may be considered.

Mize v. Rocky Mt. Tel. Co., 38 Mont. 534.

In the case of

Hollenback v. Stone & Webster Eng. Corp.
46 Mont. 559,

it was said:

“If it is possible from the evidence in this

record to account for the amount of the verdict, then this court ought not to interfere.

* * *

Under the statute, the amount of the verdict must of necessity rest in the sound discretion of the jury. The parties are entitled to a verdict from the jury, and it is only in rare instances that the court is justified in interfering, unless the record discloses that the elements of passion and prejudice have influenced the minds of the jurors in arriving at the result."

This matter was considered upon a motion for a new trial, and as already stated, the court's action is final and should be deemed so.

REMARRIAGE.

There is also discussed in appellant's brief the fact that since the trial, Dr. Ennis remarried. How it is expected that this matter can be considered by this court passes comprehension. The record nowhere discloses that fact. It was urged upon the consideration of the trial court on the hearing of the motion for a new trial and failed of its purpose.

We met the proposition then, as we meet it now, by saying that outside of the two cases referred to in appellant's brief, and an inspection of these cases plainly shows that they are of no value as authority on the proposition under consideration, the courts universally hold that this character of evidence is not competent. As to its admissibility, the doctrine is broadly stated in

Vol. 8 Am. & Eng. Ency. of Law, page 937, as follows:

“In an action by a husband to recover for the wrongful killing of his wife, in which one of the principal elements of damage is the loss to him of his wife’s services, the defendant cannot show, in reduction of damages, that the plaintiff has married a second wife who performs for him all the services rendered by his deceased wife.”

We have discussed with painstaking detail, all of the points which are urged in the brief of appellant, and most respectfully insist that the errors complained of do not exist, and that the judgment should be affirmed.

Respectfully submitted,

R. O. LUNKE,

WALSH, NOLAN & SCALLON,

Attorneys for Defendants in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

OLD COLONY TRUST COMPANY, as Trustee,
Appellant,
vs.
THE CITY OF TACOMA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

Filed

JUL 1 - 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

OLD COLONY TRUST COMPANY, as Trustee,
Appellant,
vs.
THE CITY OF TACOMA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Western District of Washington,
Southern Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Answer.....	18
Assignment of Errors..	102
Attorneys, Names and Addresses of	1
Bill of Complaint.....	3
Bond on Appeal	107
Bond on Temporary Injunction	55
Certificate of Clerk U. S. District Court to Trans- script of Record.....	109
Citation	110
Complaint, Bill of	3
Decision	35
Decision on Application for Temporary Injunc- tion, Memorandum.....	30
Evidence, Statement of the.....	58
Injunction Bond, Temporary.....	55
Injunction, Temporary Writ of.....	56
Judgment.....	100
Memorandum Decision, Filed December 18, 1914..	30
Motion for Temporary Injunction.....	18
Names and Addresses of Attorneys	1
Opinion	35

Index.	Page
Opinion on Application for Temporary Injunction	30
Order Allowing Appeal	101
Order Directing Transmission of Original Exhibits, and Approving and Settling Statement of Evidence	98
Order Extending Time to File Statement of Evidence, and to File Record in Appellate Court	112
Order for Temporary Injunction.....	53
Petition for Appeal	100
Return on Service of Writ.....	57
Statement of the Evidence.....	58
Stipulation as to Record on Appeal, and Waiving Act of February 13, 1911.....	1
Temporary Injunction Bond	55
Temporary Writ of Injunction.....	56
TESTIMONY ON BEHALF OF PLAINTIFF:	
BEAN, L. H.	58
Recalled	97
SHACKLEFORD, JOHN A.	75
TESTIMONY ON BEHALF OF DEFENDANT:	
COLLINS, B. W.	87
LAWSON, NICHOLAS	81
STILES, T. L.....	89
WOODS, OWEN	87
Writ of Injunction, Temporary	56

Names and Addresses of Attorneys.

JAMES B. HOWE, Esquire, Pioneer Building,
Seattle, Washington, and

JOHN A. SHACKLEFORD, Esquire, Perkins
Building, Tacoma, Washington,

Attorneys for the Appellant.

T. L. STILES, Esquire, City Hall, Tacoma, Wash-
ington, and

FRANK M. CARNAHAN, Esquire, City Hall,
Tacoma, Washington.

Attorneys for the Appellee. [1*]

*In the District Court of the United States, Western
District of Washington, Southern Division.*

No. 18—E.

OLD COLONY TRUST COMPANY, a Corp.,
Appellant,

vs.

CITY OF TACOMA,

Appellee.

**Stipulation [as to Record on Appeal, and Waiving
Act of February 13, 1911].**

IT IS HEREBY STIPULATED BY AND BE-
TWEEN the parties hereto that the following will
constitute the record on appeal in the above cause;
typewritten copies of the following papers, omitting
all captions, verifications, acceptances of service and
other endorsements, excepting file marks. I hereby
waive the provisions of the Act of February, 1911, in
re printing of transcripts on appeal:

*Page-number appearing at foot of page of Original Certified Transcript
of Record.

1. Stipulation.
2. Bill of Complaint.
3. Motion for Temporary Injunction.
4. Answer.
5. Decision on Temporary Injunction.
6. Order for Injunction.
7. Temporary Injunction Bond.
8. Writ of Injunction.
9. Statement of the Evidence.
10. Judgment.
11. Petition for Appeal.
12. Order Allowing Appeal, etc.
13. Assignments of Error. [2]
14. Bond on Appeal.
16. And that no exhibits be copied but that the original exhibits be sent to the Circuit Court of Appeals with the transcript, for the examination of that court.

JAMES B. HOWE,
JNO. A. SHACKLEFORD,
Attorneys for Appellant.
T. L. STILES,
City Atty.,
Attorney for Appellee.

[Endorsed]: "Filed in the U. S. Dist. of Washington, Southern Division. Feb. 13, 1915. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy."
[3]

Bill of Complaint.

To the Honorable the Judges of the District Court
of the United States, for the Western District
of Washington, Sitting in Equity:

Old Colony Trust Company, a corporation created
and existing under the laws of the State of Massachu-
setts and authorized to do business in the State of
Washington, brings this its Bill of Complaint as
trustee against the City of Tacoma, a municipal cor-
poration created and existing under the laws of the
State of Washington, located in the County of
Pierce, in the Southern Division of the Western Dis-
trict of Washington.

And thereupon plaintiff complains and alleges:

I.

The plaintiff at all times hereinafter mentioned
was and now is a corporation created and existing
under the laws of the State of Massachusetts, and was
and is a citizen and resident of the State of Massa-
chusetts, and not a citizen and resident, or either, of
the State of Washington.

II.

The defendant, the City of Tacoma, at all times
hereinafter mentioned was, and now is a municipal
corporation of the first-class created and existing
under the laws of the State of Washington, located
in the County of Pierce, and in the Southern Divi-
sion of the Western District of Washington.

III.

That at all of said times the Tacoma Railway &
Power Company, hereinafter called the Power Com-

pany, was and now is a corporation created and existing under the laws of the State of New Jersey, engaged in the operation of street railway lines and power lines for the purpose of conveying electric [4] power in the City of Tacoma, in the State of Washington.

IV.

On the 1st day of April, 1899, the Tacoma Railway & Power Company, in order to raise money to carry out the objects for which it was incorporated and to enable it to discharge its duties in the County of Pierce and State of Washington, executed and delivered to the plaintiff a mortgage or deed of trust upon the franchises and all of the property, real, mixed and personal, which the Tacoma Railway & Power Company then owned and all which it might thereafter acquire, to secure an issue of \$1,500,000 of negotiable first mortgage bonds of the Power Company, bearing interest at the rate of five per cent per annum, payable semi-annually, which said mortgage the plaintiff duly executed as trustee and accepted the trust imposed upon it, and said mortgage was thereafter recorded and has ever since been of record in the office of the Auditor of Pierce County, State of Washington, as a real and chattel mortgage. Thereafter the bonds mentioned in said mortgage were duly issued to the amount of \$1,500,000, and such bonds are now outstanding to the amount of upwards \$1,300,000.

V.

Among the franchises which became subject to the lien of said mortgage was that certain franchise granted by the City of Tacoma to the Tacoma Rail-

way & Power Company by Ordinance No. 2295, entitled "An ordinance granting to the Tacoma Railway & Power Company, a corporation, the right, franchise and privilege to construct and maintain poles, lines, underground conduits, string wires thereon and therein, and maintain the same and to transmit thereover electricity for the purpose of furnishing power and heat within the City of Tacoma, and repealing Ordinance [5] No. 55." Said ordinance was duly passed by the City Council of the City of Tacoma, and thereafter, on February 9, 1905, duly approved. Said ordinance as enacted was to continue in force and effect for twenty-five years from February 9, 1905, unless sooner terminated according to its provisions.

VI.

In the course of its business and with funds derived from the sale of some of the bonds secured by said mortgage, the Power Company purchased certain poles, wires and electric appliances, all of which, before the erection of the same as the power lines hereinafter mentioned, became subject to the lien of said mortgage, and said poles, wires and electric appliances, after becoming so subject to the lien of such mortgage, were used by the Power Company in constructing certain lines for the transmission and distribution of electricity for use for power purposes, which said lines were thereafter operated for such purpose by the Power Company.

VII.

The City of Tacoma now claims to be the owner of such poles, wires and electric appliances free from the lien of the plaintiff's mortgage.

VIII.

In the year 1908 the City of Tacoma authorized the Power Company to furnish electricity for lighting purposes, subject to the right of the City to revoke such permit. In December, 1908, and while said permit was in force the Power Company entered into a contract with the Northern Pacific Railway Company, wherein the Power Company agreed to furnish to the Railway Company at its depot in the city and at its shops in South Tacoma electric power. The Power Company thereafter [6] continued to furnish power to the Northern Pacific Railway Company. The power so furnished was delivered by the Power Company to the Northern Pacific Railway Company upon the premises of the Railway Company at a voltage of 2300 volts, which voltage was too high to be used for lighting purposes. The Northern Pacific Railway Company transformed such power to such lower voltage as enabled it to use the same for lighting and other purposes. That at all of said times the City of Tacoma was not able to furnish to the Railway Company the power service which the Railway Company desired to receive, and which was then being furnished by the Power Company.

IX.

On April 2, 1913, the City Council of Tacoma adopted a resolution, which was as follows:

“WHEREAS, under the provisions of Amendment No. XVI, to The Charter of the City of Tacoma of 1890, and of Ordinance No. 2295, the Tacoma Railway and Power Company has been permitted, tem-

porarily, to supply electric current in said City to persons and corporations who have used the same directly or indirectly for lighting purposes; and

WHEREAS, it is no longer expedient or permissible that such authority be exercised by said Company; NOW, THEREFORE,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TACOMA:

That any and all permits to the Tacoma Railway and Power Company to furnish electric current to persons or corporations in the City of Tacoma, to be used for lighting purposes, be and the same are hereby revoked; and that said Tacoma Railway & Power Company from and after the 15th of April, 1913, cease to furnish or supply to any person or corporation in the City of [7] Tacoma any electric current for lighting purposes; and

RESOLVED, That the City Clerk forthwith deliver to said Tacoma Railway & Power Company a certified copy of this resolution."

After the passage of said resolution and before the 21st day of April, 1913, the Power Company asserted the right under its franchise to sell electric power to the Northern Pacific Railway Company at a voltage too high for lighting purposes and that the transformation by the Northern Pacific Railway Company of such power upon its premises to a voltage low enough for lighting purposes was not a violation of the franchise. That if the City claimed the Power was without authority to sell such power the City should institute suit to enjoin the Power Company from continuing to sell such power. The Com-

mission of Light and Water of the City of Tacoma, the said commissioner being the officer in charge of the operation of the water and electric plants of the City of Tacoma, informed the said manager of the Power Company that it was the desire of the City of Tacoma that said Power Company continue to furnish electricity to said Railway Company in the same manner that such electricity had theretofore been furnished until such time as the rights of the Power Company and of the City could be determined, and said Commissioner with the manager of the Power Company consulted the City Attorney of said City, and said City Attorney advised said Commissioner that there was no objection to such continuation of service by said Power Company to said Railway Company until a determination of the rights of the parties could be had. Prior to the 21st day of April, 1913, it was arranged and agreed between the City Attorney of said City and the manager of said Power Company that the question of the right of the Power Company [8] to serve the Northern Pacific Railway Company would be tested by an injunction suit to be brought by the City of Tacoma, and said manager was informed by both said Commissioner and said City Attorney that no action would be taken by the City for the purpose of forfeiting the franchise of said Power Company.

About the 21st day of April, 1912, said manager was advised by the City Attorney that the City did not desire to bring suit to enjoin the Company from furnishing power to the Railway Company for lighting purposes, as the City was bound by its own ordinances, and it was unnecessary for it to bring a suit

to enforce its ordinance, but that the proper course would be that the Power Company should institute a suit against the City to prevent the City from interfering with the City, and that in such suit the City would not oppose the granting of a restraining order. At that time the said manager had an agreement with the City Attorney, the Commissioner of Light and Water and the Commissioner of Public Works, that the Company during the pendency of such suit should continue to furnish electricity to the Railway Company until the whole matter should be finally disposed of. Pursuant to such understanding and in order to enable the company to make a test suit, the City Council on the 21st day of April, 1913, adopted the following resolution:

“WHEREAS, it appears that the Tacoma Railway & Power Company grantee of the franchise created by Ordinance No. 2295, entitled:

‘An ordinance granting to the Tacoma Railway and Power Company, a corporation, the right, franchise and privilege to construct and maintain pole lines, underground conduits, string wires thereon and therein and maintain the same, and to transmit thereover electricity for the purpose of furnishing power and heat within the City of Tacoma, and repealing Ordinance No. 551,’

is contrary to the terms and conditions of said ordinance, supplying electric current to be used directly and indirectly for [9] lighting purposes, and to run motors, dynamos and other machines by which electric current is generated for lighting purposes, to persons, firms, associations and corporations

in the City of Tacoma; NOW, THEREFORE,

BE IT RESOLVED BY THE CITY COUNCIL
OF THE CITY OF TACOMA:

That for the said violation of said franchise it is the intention of the Council of said City to repeal said Ordinance No. 2295 and revoke the privileges granted thereby, unless the said violations shall cease within thirty days after the giving of the notice hereinafter provided for; and

RESOLVED; That the Commissioner of Public Works serve notice of the intention to repeal said ordinance upon said Tacoma Railway and Power Company, to the effect that if said failure to comply with the terms and conditions of said ordinance is not corrected before the expiration of thirty days after such service, the City of Tacoma will consider the franchise granted by said ordinance null and void and absolutely of no effect because of such failure; and will claim forfeiture to it of all poles, wires, lines and other property that may have been located or constructed in pursuance of said ordinance within said City, unless the same be removed within sixty days thereafter; and that the council of said City will repeal said ordinance."

Prior to the expiration of thirty days from the date of such resolution, with the exception of the Northern Pacific Railway Company, the Power Company was not furnishing power which was used for light to any one, and continued to furnish power to the Northern Pacific Railway Company only because of the understanding that until the whole matter of the right of the com-

pany to furnish electricity to the Railway Company should be finally determined, the continuance to so furnish power should not be claimed ¶[10] by the City as a ground of forfeiture. A copy of the resolution of April 21, 1913, was served upon the Power Company April 23, 1913.

X.

Pursuant to such understanding and on May 22, 1913, the Power Company instituted suit in the Superior Court of the State of Washington, for Pierce County, against the City of Tacoma to enjoin the City from enforcing a forfeiture of the franchise, and of any of the right and privileges of the Power Company granted thereby, and from claiming the forfeiture of the poles, wires and other property located under such ordinance, and from interfering with such poles, wires and appliances in any manner; and in such suit prayed that a temporary injunction be granted restrained the City from taking any such action until the final hearing and determination of the suit.

On the 23d day of May, 1913, the City served its answer and cross-complaint, purporting to claim a forfeiture of the franchise. The suit was tried on June 6, 1913.

On June 14, 1913, a decree was entered adjudging, among other things, as follows:

That the franchise and privilege granted the Tacoma Railway & Power Company by said Ordinance No. 2295 had been forfeited for failure to perform the obligations of said ordinance, and adjudged said franchise to be null and void and of no further effect,

and adjudging that said Tacoma Railway & Power Company was no longer entitled to do any of the things permitted by said ordinance, except to remove its poles, lines and other property from the streets and alleys of the City, and said decree also further provided "That unless the said Tacoma Railway & Power Company within sixty days after the [11] entry of this decree removes its poles and wires and other property from the streets and alleys and public places of the City of Tacoma, the same shall thereupon become forfeited to and be the property of the City of Tacoma."

At the time when the said judgment and decree was rendered and made and entered, the Tacoma Railway & Power Company in open court gave notice that it appealed from said judgment and decree and from each and every part thereof, to the Supreme Court of the State of Washington, and the Court at said time and place ordered, upon the filing with the clerk of the court of a bond with surety in the penal sum of \$1000.00, conditioned among other things that said Company would satisfy and perform the judgment or order appealed from in case it should be affirmed, that all proceedings under said judgment should be stayed and that said judgment should not become effective pending said appeal to the Supreme Court and said order made at said time contained the further provision as follows:

"It is the intention of this order that the running of the sixty-day period allowed for the removal of poles and wires from the streets shall be suspended during the pendency of this appeal."

In accordance with said order on the 14th day of June, 1913, the Tacoma Railway & Power Company duly filed an appeal bond and supersedeas bond, conforming to the statutes of the State of Washington, and to the provisions of said order.

The said cause on appeal came on for hearing before Department Numbered One of the Supreme Court of the State of Washington, and on May 7, 1914, an opinion was handed down to the effect that said judgment and decree should be affirmed. Within thirty days thereafter a petition for rehearing of [12] said cause in the Supreme Court of the State of Washington was duly filed by the Tacoma Railway & Power Company, and on June 21, 1914, said petition for rehearing was denied, and a remittitur to the Superior Court affirming said judgment and decree was mailed to the clerk of said Superior Court, and said Remittitur was received by said clerk and by him filed in his office on the 22d day of June, 1914.

XI.

The plaintiff was not a party to any of said litigation, nor did it have either notice or knowledge of any of the proceedings therein nor of any act of the City of Tacoma for the purpose of forfeiting the franchise of the Power Company or to acquire any interest in the line constructed under such franchise nor did the plaintiff then have any notice or knowledge of any act of the Power Company in respect thereto.

XII.

The value of the poles and wires which the city

lays claim to free from the lien of the plaintiff's mortgage, and the value of the plaintiff's lien thereon, exceeds \$5,000.00, and the value of the franchise and of the plaintiff's lien thereon involved in this suit exceeds \$5,000.00, and the amount and value in dispute in this suit exceeds the sum of \$25,000.00, exclusive of interest and costs.

XIII.

The pole lines hereinbefore mentioned, and the franchise under which they were constructed, maintained and operated, were all used to serve the general public, and any interference with the use and any forfeiture of the franchise would inconvenience and damage the general public and many citizens of the City of Tacoma as well as the Company rendering the service to them, and [13] also the plaintiff. The bonds secured by the mortgage hereinbefore mentioned to the plaintiff as trustee are outstanding and have a long time yet to run, and the physical property which is in controversy and upon which said mortgage is a lien of such a character, that if it passes into the possession of the City of Tacoma, it will become difficult of identification, and in many cases portions thereof will be lost and destroyed while other portions will be used by the City of Tacoma to injure the business authorized to be done under franchise granted by the City of Tacoma, upon which franchise the plaintiff has a lien by virtue of its mortgage; and if said poles and wires pass into and remain in the hands of the City of Tacoma for any considerable length of time, the plaintiff will be unable to realize for the bondholders any value

that said poles and wires now have.

XIV.

The physical property hereinbefore mentioned is subject to the lien of the plaintiff's mortgage, and the City of Tacoma seeks to obtain the exclusive possession of such property free from the lien of the plaintiff's mortgage. If such property be taken into the possession of the City of Tacoma, and if the plaintiff does not protect the security of the bonds secured by the mortgages executed to it, the bondholders will suffer great and irreparable loss and damage.

The proceedings on the part of the City of Tacoma to forfeit the franchise and the title to the property operated thereunder having been taken and had without any notice to the plaintiff, and being proceeds to which the plaintiff was not a party, the same, if given effect, will deprive the plaintiff of its property without due process of law, and will deny to it the equal protection of the law in violation of the Fourteenth [14] Amendment of the Constitution of the United States.

XV.

The plaintiff has no plain or adequate remedy at law, and unless an injunction be granted enjoining the defendant from interfering with the franchise and the physical property mentioned in this complaint, the lien of the plaintiff will be lost or destroyed, and the plaintiff and the bondholders for whom it is trustee will be irreparably injured and damaged, and unless a temporary injunction be granted enjoining the defendant from interfering

with the property during the pendency of this suit, the defendant will not only remove certain portions of the physical property so that they cannot be subject to the lien of the plaintiff's mortgage, but will prevent the same from being used to served persons with power unless such persons take such power from the City of Tacoma only, and then such poles and wires will be used by the City of Tacoma to give service, and irreparably injure and damage the business done under the franchise upon which the plaintiff's mortgage is a lien, and deprive the plaintiff of the revenue from such source, and such injury will be done by defendant daily during the pendency of this suit.

Forasmuch as the plaintiff can have no adequate remedy, except in this court, and to the end, therefore, that the defendant may, if it can, show why the plaintiff should not have the relief prayed, and make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its knowledge, remembrance, information and belief, full, true and perfect answer make to the matters in this Bill hereinbefore stated, but not under oath (an answer under oath being hereby expressly waived)—

Plaintiff prays that a provisional or preliminary injunction [15] be issued restraining the defendant, the City of Tacoma, its officers, agents and employees from taking any step whatsoever to forfeit the franchise granted by Ordinance No. 2295, and from making any claim that such franchise has been forfeited, and from taking any steps whatsoever

interfering with the poles, wires and electrical appliances constructed thereunder, and from asserting title thereto during the pendency of this suit, and that upon final hearing and determination of this suit all acts of the defendant in reference to said franchise and said property be decreed to be null and void, and the defendant forever enjoined from enforcing or attempting to enforce any proceeding claiming a forfeiture of said franchise for any matter heretofore occurring, and from making any assertion of title to any of said property; and the plaintiff prays that it have such other and further relief as the equities of the case may require and to the Court may seem meet and for its costs and disbursements herein.

May it please your Honors to grant unto the plaintiff, not only a writ of injunction conformable to the prayer of this Bill, but also a writ of subpoena of the United States directed to the said City of Tacoma commanding it on a day certain to appear and answer unto this Bill of Complaint, and to obey and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

OLD COLONY TRUST COMPANY,

By JAMES B. HOWE,

Its Solicitor.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 6, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." [16]

Motion [for Temporary Injunction].

Now comes the Old Colony Trust Company, plaintiff in the above-entitled suit, and, upon the Bill of Complaint filed therein, moves the Court for an order granting a temporary injunction restraining the defendant from asserting that the franchise granted to the Tacoma Railway & Power Company by Ordinance No. 2295 of the City of Tacoma has been forfeited, and from in any manner interfering with the poles, wires and lines constructed under said ordinance in the City of Tacoma, and from asserting any right, title or interest in said poles, wires and lines by reason of any forfeiture of said franchise, and from taking any steps whatsoever to interfere with said poles, wires and lines, or any of them, during the pendency of this suit.

JAMES B. HOWE,
Solicitor for Plaintiff.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 7, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [17]

Answer.

Now comes the above-named defendant, City of Tacoma, and appears in the above-entitled cause and answers the plaintiff's Bill of Complaint as follows:

I.

It objects and demurs to the said Bill of Complaint as a whole upon the ground that the same does not

state facts sufficient to constitute a cause of action in equity against this defendant.

II.

It admits the allegations contained in Paragraphs I, II and III of said complaint except that it alleges that said Tacoma Railway & Power Company was not engaged in the operation of power lines until the year 1905.

Admits the allegations contained in Paragraph IV.

Denies that the franchise granted by Tacoma Ordinance 2295 *because* at any time subject to the lien of plaintiff's alleged mortgage, but admits the other allegations contained in Paragraph V of said complaint.

Denies each and every allegation contained in Paragraph VI of said complaint except that it admits that said Power Company constructed certain power lines in the streets of said city pursuant to the authority granted by said Ordinance 2295, which power lines the City of Tacoma now claims to own, free from any alleged lien of plaintiff's said mortgage, as alleged in Paragraph VII of said complaint.

Admits that in 1908 said City gave said Power Company a permit to furnish electricity for lighting purposes as provided for in said ordinance as hereinafter set forth; and admits that [18] said Power Company entered into a contract with the Northern Pacific Railway Company for electric power, but defendant alleged that plaintiff, well knowing that it had no lawful authority to do so, contracted for said power for ten years, and expressly bound said Railway Company to use its current for lighting as well

as power purposes during all of said time.

Denies that said city was not able to furnish power to said Railway Company.

Admits the allegations contained in Paragraph IX of said complaint and relating to the passage of the Resolutions set forth therein, and to the assertions of right made by said Power Company, but denies each and every other allegation contained in said paragraph, and specifically denies that the Commissioner of Light and Water of the City of Tacoma, the said Commissioner being the officer in charge of the operation of the water and electric plants of the City of Tacoma, informed the said manager of the Power Company that it was the desire of the City of Tacoma that said Power Company continue to furnish electricity to said Railway Company in the same manner that such electricity had theretofore been furnished until such time as the rights of the Power Company and of the City could be determined; or that said Commissioner with the Manager of the Power Company consulted the City Attorney of said City, or that said City Attorney advised said Commissioner that there was no objection to such continuation of service by said Power Company to said Railway Company until a determination of the rights of the parties could be had; or that prior to the 21st day of April, 1913, it was arranged and agreed between the City Attorney of said City and the manager of said Power Company that the question of the right of the Power Company to [19] serve the Northern Pacific Railway Company would be tested by an injunction suit to be brought by the

City of Tacoma; or that said manager was informed by both said Commissioner and said City Attorney or either of them that no action would be taken by the City for the purpose of forfeiting the franchise of said Power Company; or that about the 21st day of April, 1913, said manager was advised by the City Attorney that the City did not desire to bring suit to enjoin the Company from furnishing power to the Railway Company for lighting purposes, as the City was bound by its own ordinances, and it was necessary for it to bring a suit to enforce its ordinance, but that the proper course would be that the Power Company should institute a suit against the City to prevent the City from interfering with the Company, and that in such suit the City would not oppose the granting of a restraining order; or that at that time the said manager had an agreement with the City Attorney, the Commissioner of Light and Water, and the Commissioner of Public Works, or either of them, that the Company during the pendency of such suit should continue to furnish electricity to the Railway Company until the whole matter should be finally disposed of; or that pursuant to such or any understanding or in order to enable the Company to make a test suit, the City Council on the 21st day of April, 1913, adopted a resolution; or that during the 30 days after the passage of the Resolution the Tacoma Railway & Power Company was not furnishing power which was used for the production of light to anyone except the Northern Pacific Railway Company, or that it continued to furnish power to the Northern Pacific Railway Com-

pany only because of the said alleged understanding that until the whole matter of the right of the company to furnish electricity to the Railway Company should be finally determined, the continuance to so furnish power should not be claimed by the City as a ground of forfeiture, or because of any understanding whatever.

Admits the allegations contained in Paragraph X of said [20] complaint except that it denies that said action was commenced pursuant to the understanding theretofore alleged or to any understanding whatever; and denies that said Superior Court made any such order as is alleged to have been made preventing the taking effect of said judgment; and alleges that not until after said judgment had been entered and said Power Company had applied to the Court to fix the amount of a supersedeas bond, was any order made at all, and said order had no effect whatever upon any matter in the cause, because the filing of the bond automatically effected a stay under the statutes of the State.

Admits that plaintiff was not made a party to said action; but denies that it did not have notice and knowledge of the proceedings therein; and alleges that through its counselors, attorneys and agents it had full notice and knowledge of every step taken in said forfeiture proceeding.

Admits that the value of the poles and wires which defendant lays claim to exceeds \$5,000, but denied each and every other allegation contained in Paragraph XII of said complaint.

Denies each and every allegation contained in

Paragraphs XIII, XIV and XV of said complaint; and defendant alleges that the property actually covered by plaintiff's mortgage is amply sufficient to secure all of said bonds and the interest thereon, many times over.

And for its further, affirmative defense to plaintiff's complaint herein, defendant alleges:

I.

That the said mortgage of the Tacoma Railway & Power Company to plaintiff covered only specific street railway franchises and real and personal property held, owned and used by said Company in connection with its operation of street railways in the City of Tacoma, and such additional street railway [21] property as it should thereafter acquire, and never covered or was intended to cover the pole lines, wires and other property constructed pursuant to said Ordinance No. 2295; and plaintiff had no lien upon or claim to said property or franchise by reason of said mortgage.

And for its further affirmative defense to plaintiff's complaint, defendant alleges:

I.

That ever since the year 1893 the City of Tacoma has owned, maintained and operated a municipal electric light and power plant to furnish itself and its inhabitants with electric light and power for public and private use.

II.

That at all the times since March 7, 1896, the Charter of said city, adopted by its freeholders, contained the following provision:

“The legislative power of the City is forever prohibited from granting to any person or corporation whatever, a franchise, privilege or right to sell or supply water or electric lights within the City of Tacoma, to the City or any of its inhabitants as long as the City owns a plant or plants for that purpose, and is engaged in the public duty of supplying water or light; except that the City council may frant a franchise to supply water or electric light to any section or part of the City of Tacoma not supplied or furnished by the city water or light plant, to cease and determine at such time as the City of Tacoma shall furnish and provide water and light in said section or part of the City.”

III.

That pursuant to said Charter provision said Ordinance No. 2295 expressly limited the right granted to the Tacoma Railway & Power Company to the furnishing of electric current for power and heat, and contained the following provision:

“*Provided*, that neither said Tacoma Railway and Power Company, nor its successors or assigns, shall have any right to supply electric current to be used directly or indirectly for lighting purposes, or to run motors, dynamos or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association [22] or corporation, except, where the grantee herein, its successors or assigns, may furnish current for street railway purposes, then and in that event current may be

sold for lighting street-cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway and Power Company, its successors and assigns, the right to sell power for power and heating purposes and for lighting street-cars; but in no event, except as hereinafter provided, shall the said grantee, its successors or assigns, furnish power to be used for lighting or generating electricity for lighting; provided further, however, that nothing in this section contained shall prevent said City from granting the said Tacoma Railway and Power Company, its successors and assigns, by special permit, the right to furnish any person, firm or corporation within said City, or said City, electric current for lighting purposes, subject to the provisions of the City Charter and the laws of the State of Washington; such permit, however, to be revocable at any time at the option of the City."

IV.

That the permit granted to said Company was granted subject to said Charter and Ordinance right of revocation.

V.

That said Ordinance No. 2295 contained many other conditions subsequent upon the performance of which the right of said Company to continue to hold the franchise granted thereby depended, and it provided as follows:

"Sec. 11. That each and every right, privilege and authority and franchise by this ordi-

nance granted shall, without the passage of any resolution, ordinance, or any action of any kind whatsoever on the part of the City of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified and mentioned, for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the Commissioner of Public Works of said City, under the directions and authority of the City Council of said City to the effect that said City will, if said failure is not corrected before the expiration of thirty days from the service of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors and assigns, to perform any or all of the conditions in this ordinance specified; and in the event of the forfeiture of the franchise hereby granted, on account of the breach of any of the conditions herein, the said grantee, its successors and assigns, shall also forfeit and surrender to the City of Tacoma, all poles, lines, wires or other property that may be located or constructed in pursuance hereof, within the City of Tacoma, unless [23] the same are removed within sixty days thereafter and said streets, alleys and public places from which they are removed put in good condition, and the same shall

thereupon become and be the property of said City of Tacoma.”

and,

“Sec. 17. This grant is subject to the right of the City Council at any time, on thirty days’ written notice to said grantee, its successors and assigns, by the Commissioner of Public Works, authority so to do, hereafter to repeal, change or modify this grant, if the franchise granted hereby is not operated in accordance with the provisions of this ordinance or at all, and the City Council reserves the right so to do and this section shall be considered as a cumulative and an additional remedy to that provided by section 11 of this ordinance.”

VI.

And said ordinance further provided that said City should have the right at any time to purchase any and all property of said grantee, erected, constructed and maintained under the terms and provisions of said ordinance, upon payment of a reasonable price therefor.

VII.

And said ordinance further provided that the grantee should be deemed to have forfeited and abandoned all rights thereunder if it failed to file an acceptance thereof, subject to its terms, conditions, stipulations and obligations, within sixty days after approval; and that in case of its failure to accept, the ordinance should be null and void and of no effect whatever; and said grantee did file such an acceptance.

VIII.

That upon the adoption of the resolution mentioned and set forth in Paragraph IX of the complaint herein, on the 2d day of April, 1913, said Tacoma Railway and Power Company refused to cease furnishing electric current for lighting purposes, and declared that under authority of what is known [24] as the "Public Service Act" of the State it could and would furnish electric current in the City of Tacoma for any and every purpose, including light, wherever it saw fit and whether said ordinance permitted it or not.

And thereupon, as expressly stipulated in said ordinance might be done, the Council of said City on the 21st day of April, 1913, adopted the second resolution set forth in Paragraph IX of said complaint, and caused the same to be served on said company.

And said company failed and refused to comply with the terms of said ordinance or the demand of said resolution, and on the 29th day after the service of said resolution upon it, commenced its said action in the Superior Court of Pierce County, Washington, in which it prayed the decree of the Court enjoining said city from repealing said Ordinance No. 2295, or declaring the same null and void, and from claiming a forfeiture of the poles, wires or other property that had been located or constructed pursuant to said ordinance within said City, and from interfering with the use by the plaintiff of said poles, wires, appliances and other property in the

manner in which said plaintiff had theretofore used the same.

And defendant for its further affirmative answer to the complaint herein,

I.

Alleges that heretofore and on the 2d day of September, 1914, the Council of said City duly passed an ordinance, No. 5892, entitled:

“An ordinance to repeal Ordinance No. 2295, approved February 9, 1905, and entitled: ‘AN ORDINANCE granting to the Tacoma Railway and Power Company, a corporation, the right, franchise and privilege to construct and maintain poles, lines, underground conduits, string wires thereon and therein and maintain the same, and to transmit thereover [25] electricity for the purpose of furnishing power and heat within the City of Tacoma, and repealing Ordinance No. 551’ ”;

whereby said ordinance No. 2295 was repealed, and said ordinance was duly published on the 3d day of September, 1914, and is in full force and effect.

And defendant for its further affirmative answer to the complaint herein.

I.

Alleges that it had no knowledge or information whatever that plaintiff had or claimed to have any lien upon said franchise granted by said Ordinance No. 2295 by virtue of its said mortgage or otherwise, or had any knowledge or information that any such mortgage existed; and that whatever right or lien

plaintiff may have in or upon said franchise or the property used in connection therewith, is and always was second, subordinate and inferior to the rights of the City of Tacoma, expressly reserved by the City Charter and said ordinance; and that in no event was the plaintiff entitled to notice of proceedings taken by the Council of said City to enforce the provisions of said ordinance to repeal the same.

WHEREFORE, having fully answered the complaint herein, defendant prays that the same be dismissed with costs.

T. L. STILES,

City Attorney,

FRANK M. CARNAHAN,

Assistant City Attorney,

Attorneys for Defendant.

(Verified.)

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 19, 1915. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [26]

Memorandum Decision, Filed December 18, 1914.

ON APPLICATION FOR TEMPORARY INJUNCTION.

JAMES B. HOWE, for Complainant.

T. L. STILES, FRANK M. CARNAHAN, for
Defendant.

CUSHMAN, District Judge.

This matter is before the Court upon the application of complainant for a temporary injunction.

The primary questions involved are the same as those considered in *Tacoma Railway & Power Company, v. the City of Tacoma* (79 Wash. 508) and *Puget Sound Traction, Light & Power Company v. City of Tacoma* (decided by this Court, September 19, 1914).

The present case differs from the two foregoing in that, while in those two cases the controversy was waged between the city on one hand, contending for, and the Tacoma Railway & Power Company and Puget Sound Traction, Light & Power Company, respectively, on the other, opposing, the forfeiture [27] of its franchise for electric power, on account of furnishing electric power for lighting purposes, in violation of its terms, while the present suit is brought by the Old Colony Trust Company, the trustee of the mortgage bondholders of the Tacoma Railway & Power Company, not a party to the former litigation.

The present suit differs further in that complainant seeks to avoid the forfeiture of the franchise, declared by the city, upon the ground that, through fraud and mistake, the officers of the Tacoma Railway & Power Company were induced to fail to comply with the city's requirements, imposed as a condition for the avoidance of forfeiture.

These differences necessitate the determination of the questions involved as in an original suit.

Old Colony Trust Co. v. Omaha, 230 U. S. 100.

The jurisdiction of the Court, being properly invoked, its exercise cannot be avoided.

Ex parte Young, 209 U. S. 223.

The exercise of discretion in the matter of granting such injunction should be controlled by consideration of the comparative damage which may result to one party or the other from granting or denying such injunction.

Thullen v. Triumph Elec. Co., 212 Fed. 143;

Pac. Tel. & Tel. Co. v. Los Angeles, 192 Fed. 1009;

Love v. Atchison T. & S. F. Ry. Co., 185 Fed. 321;

Irving v. Joint Dist. Council etc., 180 Fed. 896;

Colgate v. James T. White & Co., 169 Fed. 887; [28]

Pere Marquette R. Co. v. Bradford, 149 Fed. 492;

Buffalo Gas. Co. v. Buffalo, 156 Fed. 370;

DeKoven v. Lake Shore & M. S. Ry. Co., 216 Fed. 955.

It is manifest that, should the injunction not be granted and the City should remove the poles and wires, alleged to have been forfeited, destroying the plant and interrupting the business of complainant, and it should transpire that the complainant ultimately prevail, the damage would be irreparable, even though the City be solvent, for the extent of the damage cannot be ascertained with reasonable certainty.

The violation of its franchise, which was asserted by the City as a ground for its forfeiture, was the furnishing, by the operating company under its franchise, of electric current to the Northern Pacific Railway Company to be used for lighting purposes.

Pending litigation over the question of forfeiture, the following proposition was made by such company to the city and has been, by the latter, approved and accepted:

“In accordance with resolution by the City Commission June 2, 1913, the Tacoma Railway and Power Company hereby agrees (pending the present litigation concerning Ordinance No. 2414) to purchase, and the City of Tacoma agrees to supply, electrical energy of an equivalent amount in kilowatt hours to the amount of power which the Tacoma Railway and Power Company supplies on and after June 2, 1913, during said litigation, to the Northern Pacific Railway Company for power purposes,—a proportion of which current the City claims is being used for lighting purposes, and in addition will purchase from the City such amount of electrical energy as may be determined is being used during the same period by the Tacoma Grain Company, the Sperry Flour Company, and other customers of the Tacoma Railway & Power Company, for lighting purposes,—the electrical energy to be delivered by the City of [29] Tacoma to the Tacoma Railway and Power Company in the amount as above outlined at the 19th Street Sub-station of the Puget Sound Traction, Light & Power Company in the form of twenty-two hundred volt, two-phase alternating current. The Tacoma Railway and Power Company will guarantee a load factor of 100% for current so delivered, and will take

such current at the now prevailing rate for industrial power at 100% load factor as now fixed by Section 19 of Ordinance No. 5283 of the City of Tacoma as passed April 10, 1913."

It is apparent that the City seeks, primarily, the establishment of its right to forfeit the franchise, the poles and wires located in its streets and used thereunder. The damage, if any, to the City for the delay in the final establishment of its right is, therefore, capable of computation and comparatively easy of adjustment, if protected by a sufficient bond.

On account of this disparity in the effect upon the parties of granting or withholding the injunction, and the closeness of the questions involved, the temporary injunction will be granted, without determining the question of whether the complainant will probably ultimately prevail or not. The issue of fraud, alone, is of such a nature—so dependent upon circumstances, and the range of admissible evidence is so great that any conclusion reached upon *ex parte* affidavits is bound to be unsatisfactory.

But before issuance of the temporary injunction, counsel for the parties will be heard as to the amount of the bond. The present status, as affected by the arrangement made between the City and the operating company is to be preserved and there is no intention to allow, under the protection of the injunction, the furnishing of electric current for lighting purposes by the company. [30]

[Opinion.]

Filed Jan. 20, 1915.

JAMES B. HOWE, JOHN A. SHACKLE-
FORD, for Complainant.

T. L. STILES, FRANK M. CARNAHAN, for
Defendant.

CUSHMAN, District Judge.

Suit is brought by complainant, mortgagee of the property of the Tacoma Railway & Power Company, asking that the defendant City be enjoined from taking any steps to forfeit a franchise granted the mortgagor for electric power purposes by a certain city ordinance and from asserting title to, or attempting to control the electric appliances constructed thereunder.

Suit was brought to enjoin the forfeiture of this franchise in the State court by the mortgagor, in which suit the City secured a decree forfeiting the franchise and property used under it. The complainant in the present suit was not a party to such litigation and there is no evidence that it had notice thereof. Upon appeal, the Supreme Court of the State of Washington, affirmed [31] that decree. (Tacoma Ry. & P. Co. v. City of Tacoma, 79 Wash. 508.)

This Court in a suit by the grantee of the Tacoma Railway & Power Company, under a transfer made after the rendition of the opinion in the foregoing case by the Supreme Court, but before entry in the trial court of the remittitur, refused an injunction,

forbidding the City interfering with the property installed under the franchise, forfeited to the City by the ruling of the State court. (P. S. T., L. & P. Co. v. City of Tacoma, 217 Fed. 265.)

This Court has already held in the present suit, upon the authority of *Old Colony Trust Co. v. Omaha* (230 U. S. 100), that complainant was not, necessarily, concluded by the decree in the State Court against its mortgagor, the Tacoma Railway & Power Company, to which suit it was not a party.

Upon the consolidation of certain street railway companies, the mortgage in question was given, in 1899, to the complainant herein. The power franchise in question was not granted until 1905, some six years after the giving of the mortgage.

While it appears in the mortgage that the company was mainly engaged in a street railway business, it must be assumed that the Articles of Incorporation of the Tacoma Railway & Power Company authorized it to engage in the power business, else the franchise would not have been granted. The name of the company, also, indicates that it was to engage in the power, as well as street railway business.

The mortgage covers much property. By its terms, it was to cover "all this company's property, both personal and real and both now and hereafter acquired." After this general language, a large amount of property is described in detail, including franchises, under many particular ordinances. After which occurs the [32] following language:

“Also, any and all other franchises, rights and privileges hitherto granted by said City of Tacoma * * * to any person or corporation whatever, formerly owned by said Tacoma Railway & Motor Company (one of the consolidated companies) * * * also, any and all other franchises, rights and privileges which may be granted hereafter, by said City of Tacoma * * * either to the original grantee or grantee named in either of the aforesaid ordinances (whether those hereinabove specifically mentioned or any other hereinafter referred to only in general terms), or to said Tacoma Railway & Motor Company as the successor in interest of such original grantee or grantees, in and by any ordinance or ordinances amending, enlarging, extending or otherwise modifying either or any of said existing ordinances.”

Upon the part of the City it is contended that the description of the “after acquired property” in the mortgage is not sufficient to cover the franchise and property now in question, and that, therefore, the complainant has no interest sufficient to support its suit.

The foregoing shows an intention to mortgage “after acquired” franchises both particularly and generally and nothing appears in the situation, circumstances or language of the mortgage showing any intent to include only franchises for the operation of street cars.

The following cases have been called to the Court’s attention:

Guaranty Trust Co. v. Atl. etc. R. Co., 132 Fed., 68;

Beall v. White, 94 U. S., 382;

Smith v. McCullough, 104 U. S., 25;

Parker v. New Orleans etc. R. Co., 33 Fed., 693;

T. R. & P. Co. v. Tacoma, 79 Wash., 508;

Farmers etc. Co. v. Commercial Bank, 11 Wis., 207;

Dinsmore v. Racine etc. R. Co., 12 Wis., 649;

Farmers etc. Co. v. Cary, 13 Wis., 110; [33]

Farmers etc. Co. v. Commercial Bank, 15 Wis., 424; 82 Am. Dec. 689;

Aldridge v. Pardee, 24 Tex. Civ. App., 254; 60 S. W. 789;

Brainerd v. Peck, 34 Vt., 496;

Meyer v. Johnston, 53 Ala. 237, 331.

The foregoing cases are all clearly distinguishable from the present case.

Whether such language as that used in the mortgage in the present case would suffice as against an innocent purchaser from the mortgagor for value, it is not necessary to determine. In the present case the mortgagor and mortgagee have treated and recognized the mortgage as covering this franchise and the property used under it. As the City could not object to a mortgage being placed upon the franchise after it was granted, it is clear that it is not in a position to question the existence of the lien of the mortgage where the language, at most, is uncertain and ambiguous and the parties to the mortgage have given to it a construction extending the lien over the property in question.

A mortgage of after-acquired property can only attach to such property in the condition in which it comes into the mortgagor's hands.

Jones on Corporate Bonds and Mortgages, Sec. 114.

The following recitals from the decision of the State court show the main question in controversy, consideration of which is asked herein:

“The respondent, the City of Tacoma, is a city of the first class, and since 1893, has owned and operated a municipal lighting plant. In 1912, it qualified itself to take over the entire lighting business of the city. The appellant owns and operates a street railway system in the City of Tacoma. In 1890, the legislature passed an act (Laws 1890, p. 131) classifying cities, and empowering cities of the first class to frame their own charters. It also empowered them (Rem. & Bal. Code, Sec. 7507, subd. 7; P. C. 77, sec. 83):

“ ‘To lay out, establish, open * * * or otherwise improve streets, alleys, avenues, * * * and to regulate [34] and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used and to regulate the use thereof.’

“In pursuance of this power, the respondent framed an independent charter, and amended the charter in 1896, prohibiting the legislative

power of the city from granting to any person or corporation a franchise, privilege, or right 'to sell or supply water or electric lights within the City of Tacoma to the city or any of its inhabitants,' as long as the city owns a plant or plants for that purpose and is engaged in the public duty of supplying water or light, subject to the exception that the city might grant a franchise to supply water or electric light to any part of the city not supplied or furnished by the city plant, 'to cease and determine at such time as the City of Tacoma shall furnish and provide water and light in said section or part of the city.' This amendment was carried into the charter of 1909.

"In harmony with the charter, the city council, in 1905, adopted an ordinance granting to the appellant, its successors and assigns, for a period of twenty-five years, 'the right, privilege, authority and franchise,' to erect and maintain poles, lines, and conduits and to stretch wires thereon along, across and underneath the streets and alleys of the city for the purpose of transmitting, distributing, and selling electric current, to be furnished and used for the purpose of furnishing 'power and heat, or either of them,' for power and heating purposes, and 'for lighting street cars,' and providing that it should not 'furnish power to be used for lighting or generating electricity for lighting.' It was provided that the stipulations in the ordinance should not prevent the city from granting

the appellant 'by special permit' the right to furnish electric current 'for lighting purposes,' subject to the provisions of the city charter and the laws of the State, 'such permit, however, to be revocable at any time at the option of the city.' The ordinance further provided:

“ ‘Section 11. That each and every right, privilege and authority and franchise by this ordinance granted shall, without the passage of any resolution, ordinance or any action of any kind whatsoever on the part of the City of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns to perform any and all of the conditions in this ordinance specified and mentioned, for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the commissioner of public works of said city, under the directions and authority of the city council of said city to the effect that said city will, if said failure is not corrected before the expiration of thirty days from the serving of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified; and in the event of the forfeiture of the franchise hereby granted, on account of the breach of any of the [35] conditions herein, the said grantee, its successors and assigns, shall also forfeit and surrender to the City of Tacoma, all poles,

lines, wires, or other property that may be located or constructed in pursuance hereof, within the City of Tacoma, unless the same are removed within sixty days thereafter and said streets, alleys and public places from which they are removed put in good condition, and the same shall thereupon become and be the property of said City of Tacoma.' Ordinance No. 2295.

"Another section of the ordinance provided that the grant was subject to the right of the city at any time, on thirty days' notice to the grantee, to repeal, change or modify the grant, if the franchise granted was not exercised in accordance with the provisions of the ordinance; 'and the city council reserves the right so to do, and this section shall be considered as a cumulative and additional remedy to that provided by section 11 of this ordinance.' Another section of the ordinance, in express terms, reserved to the city the right to maintain and operate an electric light, heat and power plant. The appellant filed an acceptance of the ordinance, as follows:

'And the said Tacoma Railway & Power Company, by its manager and upon due authority of its board of directors, agrees to be bound by the conditions, limitations and obligations set forth and contained in said ordinance.'

"In December, 1908, the appellant entered into a contract with the Northern Pacific Railway Company, wherein it obligated itself to furnish to that company, at its depot in the city

and at its shops in South Tacoma, all the electric power that it uses 'for power purposes and for lighting purposes, for a period of ten years from the date of said contract.' On the second day of April, 1913, the city then being qualified to take over all the lighting business within its boundaries, passed a resolution revoking the permit which it had theretofore granted to the appellant to furnish electric current for lighting purposes, and providing that, from and after April 15 following, it should cease to furnish any current for that purpose. On April 21 following, the council passed a resolution, reciting that the appellant was then supplying electric current to be used directly and indirectly for lighting purposes. The resolution directed the commissioner of public works to notify the appellant that, in case of failure to comply with the terms and conditions of the ordinance before the expiration of thirty days after service of the notice, the city would consider the franchise granted by the ordinance null and void, and would claim a forfeiture of all poles, wires, lines and other property located or constructed in pursuance of the ordinance, unless the same should be removed within sixty days as specified in section 11, and that the council would repeal the ordinance. The notice was served on April 23. The appellant declined to comply with the notice and on the 22d day of May, commenced this action, praying that the appellant be enjoined from repealing the ordinance or de-

claring the same null and void, and praying that it be enjoined from asserting a forfeiture. [36]

“The city answered, setting forth the matters and things to which we have adverted, and praying that the appellant be enjoined from furnishing electric power in the city, to be used directly or indirectly for lighting purposes; and that the ordinance to which reference has been made, ‘and every right, privilege, authority, and franchise granted thereby,’ be forfeited and declared to be null and void.

“It was adjudged, that all the powers granted by the ordinance had been forfeited by the appellant in continuing to furnish the Northern Pacific Railway Company with power for lighting; that the ordinance should be null and void and of no further effect; that the appellant should be no longer entitled to exercise any privileges under it ‘except to remove its poles, lines, wires, and other property from the streets of said city’; that the appellant be enjoined from maintaining poles, lines or stretching or maintaining wires thereon, in, over, upon, or across the streets or alleys of the city, and from transmitting electric current over said lines or wires for the purpose of furnishing ‘power or heat,’ or for any other purpose arising out of, or dependent upon, such ordinance. It was further adjudged that, unless the appellant shall ‘within sixty days after the entry of this decree, remove its poles, wires, and other property from the streets, alleys and public places of the city,

the same shall be thereupon forfeited to and be the property of the City of Tacoma.'

"The appeal presents four principal questions: (1) Was the condition in the ordinance that the appellant should not furnish electricity for lighting purposes a valid one; that is, did the city have the power to so limit the franchise? (2) If so, was the limitation abrogated by the public service commission law (Laws 1911, p. 543)? (3) Did the refusal of the appellant to discontinue furnishing power to the Northern Pacific Railway Company for lighting purposes warrant the Court in adjudging a forfeiture? And (4) Did the Court commit error in excluding certain testimony? These questions will be treated in the order stated." (At pp. 510-514, inc.)

The first two of the four questions mentioned depend upon the construction of State statutes, and the construction given to them by the State court is binding upon this Court. Upon the third question the State court held that the equitable maxim that equity abhors a forfeiture means that, ordinarily, property will not be declared forfeited where the franchise, or coontract, leaves a discretion in the Court, and that such maxim and rule has no application in a case such as the present where the letter of the franchise, itself, makes express provision for such forfeiture. [37]

Where the jurisdiction depends on diversity of citizenship, alone, and no constitutional question is involved, as in this case, in the absence of authority

controlling on this Court, where the decision of the State court touches the same property, in consideration of the results should the decisions be conflicting—while not absolutely bound by the ruling of the State court, more than ordinary weight must be given it and its finding followed, unless the Court is fully convinced that it is erroneous. In view of the reasoning of the State court and the analysis made by it of the decisions on this question, its ruling is approved and followed.

The ordinance in question contains the following provisions:

“Section 1. That there be and is hereby granted to the Tacoma Railway and Power Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, its successors and assigns, for a period of twenty-five (25) years, the right, **privilege, authority and franchise** to erect and maintain pole lines and underground conduits and to stretch wires thereon and therein, over, along, across and also underneath the streets and alleys of the City of Tacoma in the manner hereinafter provided, for the purpose of transmitting, distributing and selling electric current to be furnished and used for the purpose of furnishing power and heat, or either of them, and the further right to charge for such current a reasonable compensation and for any other use or uses to which electricity may be put, except as hereinafter provided; provided that neither said Tacoma Railway and Power Company, nor

its successors or assigns, shall have any right to supply electric current to be used directly or indirectly for lighting purposes; or to run motors, dynamos or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association or corporation, except, where the grantee herein, its successors and assigns, may furnish current for street railway purposes, then and in that event current may be sold for lighting street cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway and Power Company, its successors and assigns, the right to sell power for power and heating purposes, and for lighting street cars; but in no event, except as hereinafter provided, shall the said grantee, its successors or assigns, furnish power to be used for lighting or generating electricity for lighting; provided further, however, that nothing in this section contained shall prevent said city from granting the said Tacoma Railway and Power Company, its successors and assigns, by special permit, the right to furnish any person, firm or corporation within said city [38] or said city, electric current for lighting purposes, subject to the provisions of the City Charter and the laws of the State of Washington; such permit, however, to be revocable at any time at the option of the city. * * *

“Sec. 11. That each and every right, privilege, and authority and franchise by this ordi-

nance granted shall, without the passage of any resolution, ordinance or any action of any kind whatsoever on the part of the City of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified and mentioned, for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the Commissioner of Public Works of said city, under the directions and authority of the City Council of said city to the effect that said city will, if said failure is not corrected before the expiration of thirty days from the service of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors and assigns, to perform any or all of the conditions in this ordinance specified; and in the event of the forfeiture of the franchise hereby granted, on account of the breach of any of the conditions herein, the said grantee, its successors and assigns, shall also forfeit and surrender to the City of Tacoma, all poles, lines, wires or other property that may be located or constructed in pursuance hereof, within the City of Tacoma, unless the same are removed within sixty days thereafter and said streets, alleys and public places from which they are removed put in good condition, and the same shall thereupon become and be the property of said City of Tacoma. * * *

“Sec. 17. This grant is subject to the right of the City Council at any time, on thirty days’ written notice to said grantee, its successors and assigns, by the Commissioner of Public Works, authorized so to do, hereafter to repeal, change or modify this grant, if the franchise granted hereby is not operated in accordance with the provisions of this ordinance or at all, and the City Council reserves the right so to do and this section shall be considered as a cumulative and an additional remedy to that provided by section 11 of this ordinance.”

Other sections of this ordinance impose upon the grantee of the franchise many affirmative obligations. The only ground of forfeiture authorized is that set forth in paragraph 11: “The failure of said grantee, its successors or assigns, to perform any and all conditions in this ordinance specified and mentioned for a period of thirty days after notice.”

It is now contended that this language contemplates only the failure to perform those affirmative duties imposed [39] upon the grantee of the franchise by the terms of the ordinance; that, so far as those things forbidden to be done by the grantee are concerned—as was the right to furnish electricity for lighting purposes—it was not intended that a forfeiture might be enforced, for such a violation; that injunctive relief in such a matter would afford an ample remedy.

It may be conceded that such relief would be more appropriate and more nearly complete—to prevent the grantee’s doing acts forbidden to it in the fran-

chise than to compel the performance of those acts undertaken by it; but the language used shows no intent to limit the right of forfeiture as contended. One of the conditions of the franchise was that the grantee should, in no event, without a permit from the City, furnish electric power for lighting. True, the word "perform," considered by itself, is more appropriate to express action than inaction; but when considered in the connection in which it was used:

"Perform any and all conditions of the ordinance specified and mentioned,"

it is clear that it contemplates both the doing and the not doing of those things required. In such connection it means the carrying out, or the fulfilling of all conditions of the ordinance.

Thirty days are allowed the Tacoma Railway & Power Company under the resolution of the City Council, within which to comply with its requirements and avoid a forfeiture.

During this thirty days, there is evidence of various conversations between the officers of the Tacoma Railway & Power Company and the executive officers of the City and certain correspondence between officers of the company in charge of the matter. Evidence of such conversations was, by the State Supreme Court, held inadmissible, it appearing to that court that they had occurred before the passage of the resolution [40] of April 21st. The evidence in the present case is that a number of these conversations were after the passage of the resolution. This evidence, doubtless, shows that the offi-

cers of the Tacoma Railway & Power Company were not acting in hostile defiance of the requirements of the resolution.

This evidence, also, shows that the City was not prepared at this time to immediately take care of all of the needs of the Northern Pacific Railway Company, being supplied by the Tacoma Railway & Power Company under its contract with that company. It further shows that the officers of the Tacoma Railway & Power Company were acting under the belief that the City's officers, on account of the foregoing fact, would not insist upon a forfeiture pending on adjudication in court of the questions that had arisen between the Tacoma Railway & Power Company and the City, even though the former did continue to furnish electric power, under its contract, to the Northern Pacific Railway Company, of too high a voltage for light, but which was, by the Northern Pacific Railway Company transformed, on its own premises to a lower voltage and used for lighting purposes.

These officers of the Tacoma Railway & Power Company acted in the evident belief that the resolution of April 21st was to be treated as a threat of forfeiture, only as a step deemed—as they understood—by both the officers of the Tacoma Railway & Power Company and the City, to be necessary in order to bring the matter into court for adjudication, and made without any real purpose upon the part of the City, or its officers to actually forfeit the franchise in pursuance of the resolution in case the company failed to comply with the requirements of the

resolution within the thirty days therein provided.

[41]

This is as far as the preponderance of the evidence goes. It fails to establish, by the clear and convincing proof necessary, that the officers of the City wrongfully, or intentionally misled the officers of the Tacoma Railway & Power Company in this regard. Nor is there a clear preponderance showing acts or statements by the officers of the City of such a nature as to warrant the officers of the defendant company in assuming that the resolution declaring a forfeiture under the terms therein specified, would be disregarded.

This conclusion renders it unnecessary to consider what, if any, effect representations, or concessions on the part of the executive officers of the City, or officers acting in their executive capacity, would have towards modifying such a resolution of the City Council.

Particular significance is not to be attached to the fact that the Tacoma Railway & Power Company had contracted with the Northern Pacific Railway Company for the period of ten years, to furnish the latter company with electric power for lighting purposes, as showing a willingness to violate the provisions of its franchise for, at the time of making this contract, the former company had a permit from the City for this purpose. Though this permit was revocable at any time, the Tacoma Railway & Power Company had no notice that its revocation was definitely contemplated and, in its contract with the Northern Pacific Railway Company, provision was

made for the eventuality of the revocation by the City of this permission.

After the City answered in the State court and by cross-complaint prayed the forfeiture of the franchise, and pending the trial of that cause, the City and Tacoma Railway & Power Company entered into an agreement by the terms of which the latter was to continue supplying the Northern Pacific Railway Company electric current for lighting purposes, but it was [42] stipulated that the forfeiture claimed by the City on account of the acts complained of in the cross-complaint should be unaffected by this subsequent agreement. While this tends to show the City unprepared to handle the needs of the Northern Pacific Railway Company at the time of the claimed forfeiture, it is not sufficient to deprive the City of its right of forfeiture provided for in the franchise.

The prayer of the complaint is denied. [43]

Order for Temporary Injunction.

This cause coming on for hearing on the motion of the Old Colony Trust Company, plaintiff herein, for a temporary injunction, the said plaintiff appearing by James B. Howe, its attorney, and the defendant, City of Tacoma, appearing by T. L. Stiles, its attorney, and the Court being fully advised,—

IT IS ORDERED that the defendant, City of Tacoma, be and it hereby is restrained and enjoined during the pendency of this action and until the further order of this Court, from asserting that the franchise granted to the Tacoma Railway & Power Company by Ordinance #2295 of the City of Ta-

coma, has been forfeited, and from in any manner interfering with the poles, wires and lines constructed under said ordinance, in the City of Tacoma, and from asserting any right, title, or interest in said poles, wires and lines, by reason of any forfeiture of such franchise, and from taking any steps whatever to interfere with said poles, wires and lines or any of them, and this order is not intended to authorize and does not authorize the furnishing directly or indirectly of electricity for lighting purposes within the City of Tacoma, under the authority of said Ordinance #2295, or the use of the property constructed under said ordinance for the furnishing of electricity directly or indirectly for lighting uses within the City of Tacoma.

IT IS FURTHER ORDERED that a temporary writ of injunction in accordance with the provisions of this order issue upon the filing with and approval by the clerk of this court of a bond in the penal sum of \$2500.00, conditioned to pay all damages and costs which may accrue to the City of Tacoma by reason [44] of the granting of the temporary injunction herein authorized.

EDWARD E. CUSHMAN,

Judge.

Done in open court this 23d day of December.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 23, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [45]

Temporary Injunction Bond.

KNOW ALL MEN BY THESE PRESENTS:
That the Old Colony Trust Company, a corporation,
as principal, and United States Fidelity & Guaranty
Co., a corporation, as surety, and their successors and
assigns, are held and firmly bound to pay to the City
of Tacoma, a municipal corporation, the sum of
\$2500.00, in lawful money of the United States of
America.

In the above-entitled action on the application of
the Old Colony Trust Company, an order has been
entered on this 23d day of December, 1914, directing
the issuance of a temporary injunction against the
City of Tacoma, and the condition of this obligation
is such that if said principal and surety herein shall
pay to the said City of Tacoma, all costs and damages
which may accrue to the City of Tacoma by reason
of the granting of said temporary injunction, then
this obligation shall be void, otherwise to remain in
full force and effect.

Dated Dec. 24, 1914, Tacoma, Wash.

[Seal] OLD COLONY TRUST COMPANY,

By JAMES B. HOWE,

Its Solicitor, Principal.

UNITED STATES FIDELITY & GUAR-
ANTY CO.,

By HARRY C. MILLER,

Attorney in Fact,

Surety.

Approved: Dec. 24, 1914.

FRANK L. CROSBY,

Clerk.

By F. M. Harshberger,

Deputy.

[Endorsed]: Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Dec. 24, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [46]

Temporary Writ of Injunction.

United States of America,
Western District of Washington,
Southern Division,—ss.

The President of the United States of America to
the City of Tacoma, Municipal Corporation:

WHEREAS, Old Colony Trust Company, a corporation, plaintiff in the above-entitled action, a citizen of the State of Massachusetts, has filed on the chancery side of the District Court of the United States, for the Western District of Washington, Southern Division, a bill against the above-named defendant, and has obtained an allowance of a temporary injunction as prayed for in said Bill.

NOW, THEREFORE, we, having regard to the matters in said Bill contained, do hereby command and strictly enjoin you, the said City of Tacoma, during the pendency of this action and until the further order of said District Court, from asserting that the franchise granted to the Tacoma Railway & Power Company by Ordinance #2295 of the City of Tacoma, has been forfeited, and from in any manner interfering with the poles, wires and lines constructed under said ordinance, in the City of Tacoma, and from asserting any right, title or interest in said poles, wires and lines, by reason of any forfeiture of such franchise, and from taking any steps whatever

to interfere with said poles, wires and lines or any of them, all of which commands and injunctions you are required to observe and obey until said District Court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing. [47]

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 24th day of December, 1914, and in the 139 year of the Independence of the United States of America.

[Seal]

FRANK L. CROSBY,
Clerk.

By F. M. Harshberger,
Deputy.

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Temporary Writ of Injunction on the therein named City of Tacoma by handing to and leaving a true and correct copy thereof with A. V. Fawcett, Mayor of the City of Tacoma, Washington, personally, at Tacoma, Washington, in said District, on the 24th day of December, A. D. 1914.

JOHN M. BOYLE,
U. S. Marshal.

By John T. Secrist,
Deputy.

Marshal's fees—\$2.00.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.

Dec. 24, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [48]

Statement of the Evidence.

This cause came on for hearing on the 6th and 7th days of January, 1915, before the Honorable E. E. Cushman, Judge. James B. Howe, and John A. Shackelford, appeared for the plaintiff and T. L. Stiles, for the defendant.

The plaintiff offered in evidence a copy of the mortgage made by the Tacoma Railway & Power Company to the plaintiff. Certification of the copy having been waived. The copy was admitted in evidence and marked Exhibit "I."

[Testimony of L. H. Bean, for Plaintiff.]

L. H. BEAN, was sworn as a witness and testified that he had been manager of the Tacoma Railway & Power Company for four years and ten months, and that he was familiar with the lines, poles, wires and franchises in controversy, in the suit. That the revenue from the operation of the poles, wires and franchises had been used for the payment of operating expenses and payment of interest on bonds secured by the mortgage to the plaintiff. He stated that the Tacoma Railway & Power Company had been for some years supplying electricity to the Northern Pacific,—that the City of Tacoma claimed that the Northern Pacific Railway Company was [49] using a portion of that power for lighting, and that the City claimed that the only authority under which electricity ultimately used for lighting purposes could be supplied was under a revocable per-

(Testimony of L. H. Bean.)

mit, and that on April 2d, 1913, the City passed a resolution revoking the permit to the Tacoma Railway & Power Company to sell power which would in turn be used in whole or in part for lighting purposes.

Mr. Bean was asked this question: Q. Now, at what voltage was the Company furnishing power to the Northern Pacific?

Judge Stiles objected to the question as not relevant or material. The objection was overruled and a recess was taken to enable the attorneys to agree upon a stipulation as to the part of the facts in the case. When the Court reconvened Mr. Bean testified as follows:

“Well, the resolution revoking the permit was passed on the second day of April, 1913, and the next morning I called on the Commissioner of Light and Water and told him that while we did not feel that the Company was obligated legally to give up the business, we did not want to take any chance whatsoever in connection with our franchise and we were prepared at that time to turn the total business of the Northern Pacific Railway Company over to him if he was prepared to take it over. I called his attention to the fact that I had had estimates made of the probable cost of the city taking the business over, which was about \$8,000.00. I also told him that in view of the fact that it was not absolutely certain in my opinion that *that* the City could retain the business, there might be some loss to the City in the event [50] they did not eventually keep it. He said he

(Testimony of L. H. Bean.)

wanted to think the matter over as to whether I,—whether we should continue to supply the Northern Pacific, and that he would talk to me again about it. I called on him, I believe it was the next day, and had another talk with him and he said that the City wanted the Tacoma Railway & Power Company to continue to supply the Northern Pacific Railway Company. I told him that we could not afford to do this unless the necessary steps were taken to protect our franchise in the matter and that I would write him a letter setting forth the company's position and willingness to continue to supply the current, providing the necessary steps were taken to protect us. That was on the 4th day of April, that I wrote a letter and took it to the Commissioner of Light and Water, and he said that he thought that it was all right, and I suggested that we go and talk to the City Attorney about it."

Judge Stiles objected to the statement of the witness on the ground that it was inadmissible, irrelevant and immaterial and incompetent to charge the City. The objection was overruled.

A letter marked Exhibit 11 was called to the attention of Mr. Bean, and Judge Stiles said: "This is one of the letters to which I object. There is a bunch of them. They are letters back and forth between Mr. Bean and Mr. Howe, and someone else, because they are merely communications between individuals representing the plaintiff and the other side." The objection was overruled and Mr. Stiles stated: "I wish to have it understood here that I may take an exception and have it allowed without

(Testimony of L. H. Bean.)

announcing it.” [51] The Court said: “It will be understood that you will reserve your exceptions where you object.”

The witness continued: “This is a letter dated Apr. 16th, to Mr. James B. Howe, and was written inclosing a copy of a letter which had been drawn up with reference to continuing the furnishing the Northern Pacific Railway with electric current pending the adjustment of the matter through the court and was written after I had a talk with the City Attorney, in which he had suggested that the best thing was for the City to bring an injunction suit,—to prevent the Company from furnishing the current as it was furnishing it to the Northern Pacific Railway Company.

The next letter was from Mr. Howe under date of April 17th, returning the draft of the letter which I had sent him of date of April 16th, and on receipt of that on April 18th, I acknowledged the receipt of it and wrote to the Commissioner of Light and Water again under that date. A copy of which letter is set forth in the stipulation, and as under date of April 18th. That letter was taken to the Commissioner and talked over with the Commissioner and with Judge Stiles, and Judge Stiles stated that he had been considering the matter and he had come to the conclusion that it was not proper for the City to bring an injunction suit in the matter, as it was guided by this ordinance, and if they should bring suit of that character the Court would not recognize it, feeling that the City should be guided by its own ordinances. I might state that he suggested at that time that the proper thing to do was for the com-

(Testimony of L. H. Bean.)

pany to bring the action, which changed the plan, and accordingly I wrote a letter [52] under date of April 21st to Mr. Howe, the letter which I have referred to before. I inclosed a copy of the resolution which Judge Stiles stated would be introduced that day, and which I understood was being introduced for the purpose of giving the Company some basis of bringing an action, which was in the nature of a threat, and would give the Company a basis for bringing an action to prevent them carrying out the resolution.

Judge Shackelford and I called on Judge Stiles and talked the matter over with him and it was at that time that he stated that it was not proper for the City to bring suit. I talked with the City officials a number of times after April 24th. I talked with them all up until the latter part of the month, and I wrote a letter the 30th of April, outlining the Company's position and delivered it in person to the Commissioner of Light and Water. The letter is Exhibit No. 10. The next step that was taken was by bringing action against the City to prevent enforcement of this resolution. Mr. Howe wrote to me on May 5th that he had received my letter, and that he did not think that the change of program materially affected the situation. That is Exhibit No. 16. I had a number of talks with the City officials, always indicating to them our desire to act properly in the matter and not to continue the business unless they would agree to,—if it would not jeopardize the Company's franchise in the matter and I was assured by them that there was no intention on the part of the

(Testimony of L. H. Bean.)

city to endanger the Company's franchise whatever, and after our bringing action, the next I knew of it was somewhere about the 23d day of May, when I received the City's answer and cross-complaint. Prior to that [52½] I had no knowledge or notice, that the City intended to insist on a forfeiture of the franchise. That answer was served on the 23d day of May. The suit by the Company was on the 22d day of May. Immediately after the receipt of the answer and cross-complaint, the matter was taken up again vigorously with the City in an effort to have them take over the business if they possibly could, because we did not want to continue to supply, if there was any danger at all, because I had been reiterating to them time and again, and following out these negotiations on June the 2d, the City passed a resolution authorizing the Commissioner of Light and Water to enter into a contract with the Company for the continuation of the supply of current to the Northern Pacific, and in accordance with this resolution, the City at that time, not being prepared to actually take over the business, as it had been offered to them, entered into a contract on June 4th, through its commercial agent, for the Tacoma Railway and Power Company to continue to supply the Northern Pacific Railway Company. I wrote two letters to Mr. A. L. Thorn under that date. On June 4th I wrote a letter marked Exhibit No. 7, to the commercial manager of the light and water department of the City of Tacoma referring to the contracts entered into between the City of Tacoma and

(Testimony of L. H. Bean.)

the Tacoma Railway and Power Company covering the purchase by the Tacoma Railway & Power Company of an equivalent of the amount of electricity as is sold to the Northern Pacific Railway Company. This letter was with reference to the City not being prepared to furnish the power. At the time that was entered into I offered to turn over the business, all of the business to the City. [53] And I offered at any time to pay the City what the Company received from that business. In accordance with our contract, we have paid to the City the full amount of money due it, pursuant to this contract. The stipulation that was in the other case was entered into by Judge Shackelford and Judge Stiles. The Company carried out the contract in every particular. The effect on the business of the Company if the City took possession of the poles and wires in controversy would be that the Company would necessarily lose the business that is furnished by maintaining the poles and wires. It would affect the business of the Company materially. The forfeiture of the franchise would affect the mortgagee materially, and it would reduce the amount of income, materially. I should judge it would be in the neighborhood of twenty-five or thirty thousand dollars a year. The removal of the poles or the taking of those poles and wires by the City would materially interfere with the power system of the Company. It is almost impossible to calculate the amount of real damage which would ensue, because it would necessitate a rearrangement of most of the power system in order to properly carry out the business of the Company.

(Testimony of L. H. Bean.)

And that condition, would continue as long as the term of the franchise. I mean if we lost the business and did not lose the franchise. The value of those poles and wires is more than \$3,000.00.

Mr. Bean testified on cross-examination that the Tacoma Railway & Power Company was in business before the mortgage dated in 1899. That he was not familiar with the original organization and was not here when the franchise under Ordinance #2295 was granted. That prior to [54] the granting of that franchise the Company was in the street railway business, and if the franchise were taken away that it would have left the street railway business. That the actual value of the property of the Tacoma Railway & Power Company is in excess of six million dollars, including some property outside of the City. The property outside of the City referred to is a line from the City limits to the Town of Steilacoom, about five and one-half or six miles. The portion of the Spanaway line, outside of the City limits, approximately six miles, worth approximately at least, \$5000.00 per mile, and that the Company does not own other street railway property outside of the City in addition to the two lines mentioned. The witness also stated that he is not familiar with the market value of the property covered by the Old Colony Trust Company mortgage, which includes the total property of the Tacoma Railway & Power Company. That his statement as to the value of the property of the Company being at least six or seven million dollars referred to the estimated physical valuation of

(Testimony of L. H. Bean.)

the property or the replacement cost. That the Company at the present time is not earning more than enough to pay operating expenses, taxes and interest on its bonds and floating indebtedness. That the Company has a large floating debt, on which it pays interest. That the contract that the City made during the litigation was one to purchase a certain amount of current at certain load factor which made the amount equal, the witness thought, to about \$860.00 per month. That \$860.00 per month was the amount paid the City for current equivalent in amount to the current which the Company was selling to the Northern Pacific. That the Company had other power [55] customers than the Northern Pacific. That the Company did not as a regular thing manufacture electricity to sell, but purchased electricity from another Company. That the contract is based upon maximum load and for this reason the kilowatt hour price would fluctuate. That the cost for power has been about .575 per kilowatt hour.

The witness stated he would have to refer to the books to find out the gross amount of cost. He said he could not tell what the profit per annum of the power business was. He stated that he was manager of the Tacoma Division of the Puget Sound Traction Light & Power Company. That Mr. Shackleford was Attorney for the Tacoma Railway & Power Company and President of that Company, and that Mr. James B. Howe is General Counsel for the Puget Sound Traction Light & Power Company, and the

(Testimony of L. H. Bean.)

Tacoma Railway & Power Company. That he verified the complaint in the suit commenced in this court on August 17th, to enjoin the City of Tacoma from taking possession of certain poles and wires, which suit was brought by the Puget Sound Traction Light & Power Company, and that the statement contained in paragraph nine of said complaint was true, that on "June 11th, the Tacoma Railway and Power Company sold and transferred to the Puget Sound Traction, Light & Power Company, such of the poles and wires of the Tacoma Railway & Power Company as had been theretofore used by said Tacoma Railway & Power Company, in the City of Tacoma, in the distribution of electricity for power purposes under Ordinance #2295." And witness took part in that sale and transfer, that he had it up with Mr. Leonard, General Manager of the Puget Sound Traction Light & Power Company, and took it up with Mr. Howe, and the plan of sale was arranged [56] with those gentlemen. That the property was sold subject to the Old Colony Trust Company mortgage, and the consent of the Old Colony Trust Company to the transfer was not procured, and that no release was procured in accordance with the provisions of the tenth article of the mortgage. That there were no other customers than the Northern Pacific which had been directly or indirectly using current for lighting purposes.

"Q. Now, on the second of April, were you at the City Hall when the resolution of the second of April was passed?

(Testimony of L. H. Bean.)

A. I was not in the council room at the time it was passed.

Q. How soon afterward did you know that it was passed? A. That afternoon.

Q. In fact, a copy of it was furnished to you.

A. I received a copy of it the same afternoon, I think.

Q. What was there about that resolution which stirred you up to be in fear that you might lose your franchise?

A. Well, it was not exactly that resolution. It was the fact that the City of Tacoma claimed that we could not under our franchise, sell a person power and could devote that power to any use that we desired and I felt that we could sell power and that a person could, in turn, use it for any purpose, and I did not want to take any chances whatsoever with any legal questions as to the franchise. That came to my mind, that I could not take any chances with it and I immediately opened negotiations with the City to see if they would give us authority to continue until we could test the thing out in court to see what rights we had under the franchise.

Q. The resolution merely required you to stop furnishing electric current to be used directly or indirectly for lighting purposes?

A. Shall I go ahead and explain that? [57]

Q. Take that resolution and point out to me what there was in it that should give you any qualms about that franchise.

A. Nothing particularly in it except this: We had

(Testimony of L. H. Bean.)

a contract with the Northern Pacific Railway Company, to furnish a certain amount of power. Its premises were so wired for the use of this power for light and power that they could not be separated, and I felt that the Company had to live up to its contract with the Northern Pacific Railway Company under all circumstances, and in order to do that, it was necessary not to do anything contrary to its franchise rights.

Q. The City officials did not know anything about that situation, did they? A. They certainly did.

Q. Did they know anything about the contract with the Northern Pacific until after that case was tried on the sixth of June? A. Yes, sir.

Q. Who knew?

A. I told Mr. Lawson and his assistant and you, sir.

Q. Of the contents of that contract?

A. I did not say that I told you about the contents of that contract, but I most assuredly told you that we had a contract with the Northern Pacific Railway Company—(interrupted).

Q. But that I am not questioning you about. I say, did you ever make known to any of us that you had a contract with the Northern Pacific Railway Company running for ten years and which bound you to furnish current to the Northern Pacific Railway Company for light and power and bound it to take all of its light and power current from you?

A. Did I make known the actual contents of that contract? [58]

(Testimony of L. H. Bean.)

Q. Yes. A. I do not know as I did.

Q. When was it you say you first came to the City Hall and had a talk with reference to that resolution? A. The day after the resolution passed.

Q. On the third? A. Yes, sir.

Q. Then you came and talked to me?

A. I do not think that I came and talked to you on the same day, but it was the day following.

Q. Now, what did you say?

“I said the Tacoma Railway & Power Company was willing and ready to turn over to the City the entire Northern Pacific Railway Company business, or any part thereof, and I explained the situation, the conditions of the wiring of the different buildings of the Northern Pacific to the City, and I asked them if they were prepared to take it over. That was on April 3d. The Commissioners of Light and Water said he would have to look into the matter to see what condition they were in, and that he would talk to me about it again. The next day, the 4th day of April, I went to see him again and he said that the City was not prepared to take over the business of the Northern Pacific and he wished the Tacoma Railway & Power Company would continue to supply them, and that he would protect us in any way that was necessary, and he suggested that I should write him a letter and have his consent and the consent of the Commissioner of Public Works to the continuation of the supply.”

The witness stated he did not go to the City Council because he first wanted to straighten out the de-

(Testimony of L. H. Bean.)

tails with the [59] Commissioner of Light and Water, and get it legally right before he went to the Council. That his idea was to get an agreement for the Tacoma Railway & Power Company to continue to supply the Northern Pacific with power until the controversy with the City was settled, and that he explained his purpose very frankly. That he felt if he went to the Council first that the matter would be referred to the City Attorney and it would be necessary to retrace his steps and go over it again, that the reason the letter dated April 18th was not written earlier was that a letter had been prepared and shown to Judge Stiles and that Judge Stiles had said the letter was all right, and the witness was attempting to get it signed. That Judge Stiles said there was no reason for apprehension, and that the City had no intention of doing anything to void the franchise, and that the City Attorney had said it was a matter of form and that it was all right for us to continue to supply the Northern Pacific and that witness kept insisting on a letter so the records in the matter would be clear.

Q. That is the reason you wrote this letter of the 18th? A. Yes, sir, absolutely.

Q. And you endeavored to get Mr. Lawson and Mr. Woods to sign it? A. Yes, sir.

Q. Isn't it a fact that I would not let them sign it?

A. You never said to me absolutely. You said it was all right, but I know you would not give your consent.

(Testimony of L. H. Bean.)

Q. Do you know that this letter was ever brought to them by me?

A. Not as I know of, not that letter.

Q. Now, will you state to the Court what you considered to be the point in that letter? [60]

A. Yes, sir.

Q. Explain why you should write a letter suggesting that you were willing to do a thing which you were already bound to do, if you had any right.

The witness further stated: "The Tacoma Railway & Power Company had a contract with the Northern Pacific for the supplying of electric power, and a portion of that power we understood had been used for lighting. The City claimed we had no right to furnish this power which was in turn converted by the Northern Pacific into use for lighting. I felt that that was not the proper position for the City to take. However, we felt that we did not want to jeopardize our property or franchise rights and wanted to take whatever precaution was necessary to protect ourselves, and at the same time we did not want to lose the business unless it was necessary. But we were willing to give the business to the City, or pay them an equivalent amount, or buy the same amount of power until the matter was adjudicated through the courts. It was for the purpose of preserving the record and protecting ourselves and taking absolutely no chances with our franchise, that I, as you say, haunted the City Hall and endeavored to get a written agreement with some of the City officials, and they had assured me that there was no

(Testimony of L. H. Bean.)

intention on the part of the City doing anything of that kind."

Q. Up to that time had you ever suggested to anybody that there was wrapped up in this proposition the possible forfeiture of your franchise?

A. I had to you.

Q. Before the 18th?

A. Before that time, yes, sir. [61]

Q. To what effect?

A. You pooh-poohed the idea and said it was absolutely not the intention of the City to void the City's franchise.

Q. Now, Mr. Bean, having these oral assurances, both from the Commissioner of Light and Water and from me, why did you think it necessary to put it into writing and have those two men sign it?

A. Because I believe in putting everything of that kind in writing.

Q. Why did you not say something about a waiver of any claim to forfeiture of the franchise in this letter?

A. Because I drew up this letter for the purpose of submitting it to our counsel, and it was approved, and I supposed the Company was properly protected in the matter.

Q. Well, now, on the 21st of April, up to that time, you had not ceased furnishing power which was used for lighting purposes had you? A. No, sir.

Q. On the 21st of April, the Council passed another resolution? A. Yes, sir.

Q. You received a copy of that resolution on the

(Testimony of L. H. Bean.)

23d of April, did you not?

A. About that time, yes, sir.

Q. Now, that resolution, after reciting the passage of Ordinance No. 2295, and reciting that contrary to the terms of the ordinance, and the recall of the permit, your Company was continuing to furnish power for lighting purposes, contained this: "Now, therefore, be it resolved by the City Council, of the City of Tacoma, that for the said violation [62] of said franchise, it is the intention of the Council of said City to repeal said Ordinance No. 2295, and revoke the privileges granted thereby, unless said violations shall cease within thirty days after the giving notice hereinafter provided for," with a further provision in regard to the forfeiture of the poles, wires, etc.

Q. Now, when you received that, didn't it give you some idea that this was in earnest?

"You gave me a copy of that resolution I believe on the 21st of April, and I sent it to Mr. Howe, and I believed that that resolution was being introduced for the purpose of giving the Company some basis for an action to test out its rights in the matter, as previous to that time you and I and Judge Shackelford talked the matter over, and you told me you did not believe it was proper for the City to bring an action against the Company, and I supposed that this was to give the Company some basis for bringing an action against the City, and we proceeded from that time on on that theory." It was at my procurement resolution 6161 was passed. [63]

[Testimony of John A. Shackelford, for Plaintiff.]

JOHN A. SHACKLEFORD was sworn and testified that he had lived in Tacoma for twenty-five years, and was a lawyer, and had been City Attorney of Tacoma, and one of the Judges of the Superior Court of Tacoma, and that he is attorney for the Tacoma Railway & Power Company, and President of that Company, and one of the attorneys for the Puget Sound Traction Light & Power Company and the Puget Sound Electric Railway. The witness was asked to state what he had to do with Judge Stiles and Mr. Bean in reference to the franchise which was the subject of controversy. Mr. Stiles objected to the question on the ground that the question was immaterial and irrelevant. The objection was overruled and the witness testified as follows:

“I had several talks with Judge Stiles after the passage of the first resolution, the resolution revoking the permits to furnish light which had been granted, or were supposed to have been granted to the Tacoma Railway & Power Company. Some of those conversations were before the resolution of April 21st, was passed. The first talk that I remember having I talked with Judge Stiles about what method should be pursued with reference to determining the right of the Tacoma Railway & Power Company to furnish electricity to the Northern Pacific, part of which electricity was used by the Railway Company for lighting purposes. In the course of that talk, I remember I made the sugges-

(Testimony of John A. Shackelford.)

tion that it might not be possible for the Company to bring an injunction suit to enjoin the passage of an ordinance forfeiting the franchise. I told Judge Stiles that we were anxious not to endanger the franchise in any way, but we wanted to make some kind of an arrangement about the suit so that the rights [64] of the parties could be determined, and the talk then followed along the line of the City bringing a suit to enjoin the Tacoma Railway & Power Company from furnishing electricity to a customer, in this instance, The Northern Pacific Railway Company, which customer used the electricity for lighting purposes. I cannot remember exactly what was said at the conversation, but I remember very well that at that time the idea of both myself and Judge Stiles, as expressed in the conversation, was along the line of the City bringing an action. After the second resolution was passed, which contained a threat of forfeiture, I had a talk with Judge Stiles, and I think that Mr. Bean was present at the time. I remember saying to Judge Stiles at that time that I supposed that if the City wanted to put the Tacoma Railway & Power Company out of the power business, that it could probably find some way in which to do so, but it seemed to me a very ill-advised course to pursue, especially in view of the fact that the supply of electricity from the City's own plant was comparatively small. Judge Stiles, at that time, said that it was not the intention of the City, that he was sure that the City had no idea of putting us out of business; that they

(Testimony of John A. Shackelford.)

wanted to get the lighting business and protect the lighting business. A day or two before the suit was brought in the State Court by the Tacoma Railway & Power Company, Mr. Bean and I went into Judge Stiles' office together in regard to getting some written statement in regard to the course to be pursued while the suit was pending, with reference to the way the Northern Pacific should be supplied. One of the letters written by Mr. Bean to Mr. Lawson,—I do not recall at this time which one it was,—but it was one of the letters that was called to [65] Judge Stiles' attention. Judge Stiles then said that he would not agree to the signing of that letter. Mr. Bean said to him: 'Well, when this letter was brought in by Mr. Lawsen and myself you said it was all right.' Judge Stiles said: 'Yes, it is all right, it is a statement made by you there; it is all right in a way, but I won't consent to signing it because it seems to me that if it was signed it would be a complete defense to any objection that the City might make to the furnishing of power to the Northern Pacific.' I cannot quote his exact words, but that is the substance of his statement at that time. He complained that the understanding had been in existence for some little while that the Company was to bring suit and that we were delaying about bringing it, and said that if we did not bring one pretty soon that he would start something. The next day I started the suit, but before I started the suit, I had that conference with Judge Stiles, and I spoke to him about a temporary injunction in the case which

(Testimony of John A. Shackleford.)

the Company was about to bring and I asked him about fixing the time when we could take up the matter of a temporary injunction. I had not made any application for a restraining order, because I felt it would be better to have some notice in the matter; that the Company would be better satisfied to have notice given and have a temporary injunction instead of an *ex parte* restraining order. Judge Stiles said it was not his intention to object to an injunction during the suit and that if I would send the papers down to him when they were prepared that he thought we could get the temporary injunction order entered without any hearing. The complaint in the suit was prepared and I think it was filed on the 21st day of May, 1913, and I believe service was not had on the Mayor until the next day.

[66] In addition to serving the Mayor, as I remember it, I sent down a copy to Judge Stiles. The next day Judge Stiles sent in his answer and cross-complaint, in which he prayed for a forfeiture of the franchise, among other things, and sent me word that he was not willing to consent to a temporary injunction but wanted to insist upon a trial of the case before Judge Easterday, within the next few days. I made no objection to the early trial of the case, and the case was tried a few days afterward before Judge Easterday. Up to the time of the receipt of Judge Stiles' cross-complaint, praying for a forfeiture of the franchise, and his refusal to consent to a temporary injunction during the meantime, I had not supposed and had not believed that the

(Testimony of John A. Shackelford.)

City intended to insist upon a forfeiture, although the resolution passed on the 21st day of April was a resolution giving notice that forfeiture would be claimed. I thought from the statement of Judge Stiles that it was not the desire of the City to put the Company out of the power business, and from other reports that I received from officers at the City Hall that it was not the intention to insist upon any forfeiture, but Judge Stiles' answer claiming the forfeiture came one day after the 30th day period was up in which we could have cut off the Northern Pacific. As soon as we received that, we went at the matter again to make some arrangements with the City which would prevent any further furnishing to the Northern Pacific Railway Company from being considered as a ground of forfeiture, and on the 2d day of June an understanding was reached in regard to that, which was put into effect by a resolution passed on the 4th day of June, and a stipulation was entered into, which is in evidence here and filed in the case, and the resolution passed is also in evidence. [67] Judge Stiles at that time insisted on keeping the period up until the 2d day of June, out from under the stipulation, although offer was made by the Company to pay an equivalent for current furnished to the Northern Pacific during that period on the same basis as during the period after that. Now, I do not want to be misunderstood as charging Judge Stiles with any intent or purpose to perpetrate any fraud on me or on the Company. I don't want to be in the position of contending that

(Testimony of John A. Shackelford.)

he artfully set up scheme by which we would be lulled into security in the matter and that he took advantage of us. In fact, I do not believe that, but the situation is this: When the matter started out, the understanding all around was that the matter of whether the Company had a right to furnish current to a customer who used a portion of it for lighting, would be fought out without putting the Company out of business as it was sometimes expressed, or without any forfeiture of the franchise. When the change of front came on the part of the City about the matter, they can tell better than I can, but up until the expiration of the 30 day period after the service of this last resolution, it was our understanding that it was not the purpose or intent of the City to put the Company out of the power business. Now, whether it was just a misunderstanding between us or not,—I know that as far as I am concerned that that is the way that I understood it.”

The witness on cross-examination was asked: “Did you in your reply make any offer to abate the furnishing of current for lighting purposes?”

The answer was: [68] “I would rather see the reply, but I do not think we did, I am quite confident that we did not because I felt that we had a question which was one of doubt, and a question that should be determined by the proper tribunal, and that was the question whether the customer who buys current has the right to use it for any purpose that he sees fit,—there was another question also whether the passage of the Public Service Law by the

(Testimony of John A. Shackleford.)

State Legislature, had not modified the franchise so as to make it our duty to furnish a customer with electricity when we could reasonably do so and when he demanded it, no matter what use he proposed to make of it. In other words, I believed it was a case where we ought to have an opportunity not to be hung first, but have a trial beforehand.

The witness further stated that he thought the City wanted to see the matter tried out and a decision procured as to the rights of the parties.

After a recess a stipulation between the parties as to certain facts was admitted in evidence and marked Plaintiff's Exhibit "I-A." Plaintiff rested.

[Testimony of Nicholas Lawson, for Defendant.]

Upon the part of the defendant, NICHOLAS LAWSON was sworn and testified that in April, May and June, 1913, he was Commissioner of Light and Water of the City of Tacoma, and as such Commissioner had charge of the electric business of the City, which consisted of selling current for light and power. The witness stated that the City of Tacoma has a plant for the generation of electricity with machinery installed for the generation of thirty-two thousand horse-power, that the city plant generates alternating current. That the current generated was more than sufficient to provide for the requirements of the City. [69]

The witness stated that the Tacoma Railway & Power Company was furnishing current for lighting, that they had no franchise for and that the City sent the City electrician out to check up what the Com-

(Testimony of Nicholas Lawson.)

panty was doing in the City. The electrician made a report, a copy of which was admitted in evidence and marked Defendant's Exhibit "A." The witness received several calls from Mr. Bean after the passage of the resolution of April 2d.

In answer to the question, "What did he want?" the witness said: "I told him it was a legal question; that I had nothing to do about that, and that he had better go to see Judge Stiles, and we went in there to see you, and you said the same thing, that it was a thing that had to be threshed out by the courts. It was not for me to say. I had no power to give any concessions one way or the other."

The witness further testified:

"Q. Did you have any further interviews? Did you say anything to Mr. Bean to the effect that you were willing that they should go in without any danger to a forfeiture of their franchise while this was being threshed out in the courts?

A. No, sir. I told him it was a legal question. I stood on that all the time, that I had nothing to do with it.

Q. Did you receive these various letters which are in evidence here as exhibits? For instance there is one of April 18th, which has a blank at the bottom for a signature. Did you receive that? A. Yes, sir.

Q. Did you get any instructions from me as to the signing of these letters? A. Yes, sir. [70]

Q. To what effect?

A. You said to not have anything to do with them.

Q. Now, here is another one on April 30th. How

(Testimony of Nicholas Lawson.)

about that one, Mr. Lawson?

A. Yes, I remember that one too.

Q. Well, did you sign that?

A. No, sir. I did not sign any of them.

Q. Nor did you at any time make any agreement of any kind with Mr. Bean in regard to that matter?

A. I did not.

Q. Did you give him any intimation that the City might commence a suit or would waive anything while this Company was maintaining a suit?

A. I did not, because I had nothing to do with the suit.

Q. You regarded that as entirely in the hands of the legal department after it was started?

A. Yes, sir.

Q. Do you remember an occasion when Judge Shackleford was there? A. Yes, sir.

Q. Now, what happened then, Mr. Lawson?

A. Well, you and he were talking about it. I remember that much; I had really nothing to say in the matter. It was just simply in your office.

Q. Do you remember whether there was some talk about who should bring suit to thresh out this matter? A. Yes, sir.

Q. What did Mr. Shackleford want?

A. He wanted the City Attorney,—he wanted the City to bring suit. [71]

Q. Do you remember what I told him?

A. Yes, sir.

Q. What was it?

A. That the Company would have to bring the suit.

(Testimony of Nicholas Lawson.)

Q. Do you remember anything like this; that the City of Tacoma had no suit to bring and that if any suit was brought at all it would have to be brought by the Tacoma Railway & Power Company?

A. Yes, sir, I remember that.

Q. Say from the 3d day of April to the 20th day of May, how frequently would you say that Mr. Bean called upon you and interviewed you in regard to this business?

A. Oh, he was in there several times, I could not just recall just how many times.

Q. Did he call on the Council when it was in session?

A. I think he was in the Council once or twice.

Q. On that same business?

A. No, I do not know whether he was in there on that business or not, but that was brought up there, I think."

On cross-examination the witness stated that the City plant generated three-phase alternating current; that the motors used by the Northern Pacific were two-phase motors. That in order to run three two-phase motors with three-phase current it would be necessary to transform the current. That the City did not have transformers to take over two-phase motors of the Northern Pacific and had not procured the transformers at the time witness retired from office on May 7th, 1914. The witness stated that he did have a good deal of talk with Mr. Bean and that he and Mr. Bean always had been friendly and that they talked back and forth about [72]

(Testimony of Nicholas Lawson.)

the matter, but that the witness never promised anything. That he and Mr. Bean went to Judge Stiles' office with the letter brought in to him by Mr. Bean. Witness stated that he remembered a talk about the City starting an injunction suit. The witness then testified as follows:

“Q. Now, Mr. Bean talked to you about what was to be done about supplying the Northern Pacific Railway Company while the suit went on, didn't he?

A. Yes, sir.

Q. That was one of the things you and he went down to talk with Judge Stiles about?

A. We went down to Judge Stiles' office really to discuss the matter, but so far as I was concerned I had nothing to do with it. I just simply went down there with him.

Q. Now, you did have quite a good deal of talk with him about what to do with the Northern Pacific Railway Company in the meantime?

A. Well, we talked about our current being a three-phase system and theirs being a two-phase system, yes.

Q. At that time you did not have the transformer capacity to take over the three-phase motors?

A. No, we had to buy them, of course.

Q. You did not have them on hand?

A. No, sir.

Q. Do you know when, or do you remember when, you got your three-phase transformers on hand?

A. After I left the office.

Q. Did you and Mr. Bean have any talk about the

(Testimony of Nicholas Lawson.)

Northern Pacific Railway Company power load being hooked up on the same circuits that the lights came from, that the Northern Pacific [73] Railway Company did not have a separate lighting system?

A. Well, the whole trouble was this: The Northern Pacific Railway Company wiring was such that they took the current and transformed it themselves, as I understand it, not in all places, but in some places and in the City of South Tacoma, it was clear. We could have taken South Tacoma right away, the lighting was clear.

* * * * *

Q. Well, now, didn't you talk with Mr. Bean in regard to its being better for the Tacoma Railway & Power Company to go ahead furnishing the Northern Pacific while the suit was going on about the matter? I do not mean that you made any agreement about it, but didn't you and he talk about it?

A. Well, we could not shut them off, that is one sure thing; they had to be served.

Q. And you could not serve them?

A. We did not have no transformers.

Q. You told Mr. Bean that?

A. We talked about that.

Q. You talked about their having to be served?

A. Yes, sir.

Q. Now, at this time, you spoke of my being there and Judge Stiles saying that the City had no suit to bring; that the Company would have to bring suit, do you remember when that was, Nick? Wasn't that pretty close to within a day or two of the time when

(Testimony of Nicholas Lawson.)

the suit was brought?

A. Yes, pretty close to it.

Q. That was towards the last?

A. Yes, sir. [74]

[Testimony of Owen Woods, for Defendant.]

OWEN WOODS was sworn and testified that in the summer of 1913 he was Commissioner of Public Works of the City of Tacoma. Said he told Mr. Bean that anything that had to be done would be done through the City Council, and that he talked matters over with Mr. Bean in regard to trouble at South Tacoma, and told Mr. Bean he could not enter into anything that the Council would not sanction. In answer to the question: "Do you remember Mr. Bean bringing to you or sending to you some form of a letter he wished to have you sign?" witness answered: "No, sir. The first I seen of them was when they were presented here."

[Testimony of B. W. Collins, for Defendant.]

B. W. COLLINS was sworn and testified that he is Superintendent of Electric Work of the City of Tacoma.

He testified that the Northern Pacific has at its shops in South Tacoma a large number of motors supplied with 220 volts two-phase current, and that the witness believes that the lighting therein is done by single phase current of 110 volts. That the current was brought in a central transformer station and transformed from about 13000 volts to about 2200 volts, two-phase. That the Railway Company

(Testimony of B. W. Collins.)

does its own distributing. Witness stated that two phase current is two single phase currents operating at a different phase angle, and that in three-phase current there are three single currents superimposed. That three-phase current would have to be transformed to two-phase current in order to be used in the Northern Pacific motors. That in order to transform to 2200 volts, it would take the time necessary to get equipment from the east, and would take about three weeks to build it, and about 26 days for shipment. [75]

That if the Tacoma Railway & Power Company had needed furnishing power to the Northern Pacific on the 15th day of April, 1913, the City could have furnished the Railway Company with current for lighting purposes within one or two days, and that the City had power at that time to spare. That aside from the shops at South Tacoma, the Northern Pacific used electricity at the Union Depot and the roundhouses and the motors and machinery in the roundhouses and in the electrical coal bunkers on the waterfront.

Witness further testified as follows: "A. At the Northern Pacific Railway Company Depot, the lighting and power is tied in together, so that to furnish lights it would have been necessary to furnish the power with them.

Q. How long would that have taken?

A. It would have required the getting the machinery from the east to have done that.

Q. Well, and the other lights?

A. Those at the roundhouse, or a greater portion

(Testimony of Owen Woods.)

of them could have been supplied almost immediately."

The witness further stated that if the arrangement under the resolution of June 21st in regard to the continuing of supply to the Northern Pacific by the Tacoma Railway & Power Company had not been made, the City would have taken immediate steps to have taken over the Northern Pacific load, and that the suit in the State Court was not finally terminated until some time after Mr. Lawson went out of office.

Witness further testified as follows: Q. After the termination of the litigation between the Tacoma Railway & Power Company and the City, what if anything [76] was done in the way of the City's taking over the power and lighting business of the Northern Pacific Railway Company?

A. The City did take it over.

Q. Is it operating it now? A. Yes, sir.

The plat showing the locations of wires and poles involving the ones in litigation, was admitted in evidence and marked Defendant's Exhibit "B."

[Testimony of T. L. Stiles, for Defendant.]

T. L. STILES, was sworn and testified that he is City Attorney for the City of Tacoma, and has held that office since 1908. Witness testified as follows: "Immediately after the passage of the resolution of April 2d, 1913, Mr. Bean came to the office,—I do not remember whether he was with Mr. Lawson or not, the first time, but his first talks were rather in a light way, "what are you going to do to us," and such talks as that and I answered in about the same way, but I

(Testimony of T. L. Stiles.)

do not believe anything of a serious character was said at all between that and the 15th day of the month. I told Mr. Bean at that or some other time that the resolution meant just what it said; that the City must have a cessation by the Tacoma Railway & Power Company of furnishing power for lighting; that there was nothing else in mind; that there was no expectation of taking the power business away, because there was no thought but that the Company would at once yield under the provisions of its franchise ordinance. After that time, and my impression would be that it was between the 15th and 21st Mr. Bean—I am not sure whether Judge Shackelford was there or not, but at least one of them was there and began to talk in a rather [77] roundabout way about what the Company's rights were and brought in the matter of the Public Service Acts, and I saw that there was an inclination on his part at any rate, to maintain that the Tacoma Railway & Power Company had a right to go on and do business in the City of Tacoma as it pleased, without any regard to the ordinances, and we had some little talk about that and I think I expressed my surprise that they should take that position, and it was upon that that the second resolution was passed. Mr. Lawson and the electricians, of course, as soon as the 15th had passed came right after me and wanted to know what should be done next in regard to getting possession of this lighting business, and as Mr. Lawson has said, the whole thing practically was thrown upon my shoulders, and I started out then with the intention

(Testimony of T. L. Stiles.)

of pushing the thing to a legal end, and I do not remember whether there was anything said about any law suit before the passage of this second resolution or not. There may have been, but there was no agreement or anything, any more than suggestions by either side. After the passage of that resolution, and I think Mr. Lawson was mistaken, that it was very soon afterward, within a day or so, Mr. Bean came, and I think that Judge Shackelford was with him then, and then I thought that they recognized the gravity of the situation, that the resolution meant probably what it said, and they began to talk about the City bringing a suit. I remember Mr. Bean saying it in just so many words: "I suppose the City will begin its suit pretty soon to enjoin us." Well, I listened to their talk for a little bit, and finally I turned around in my chair, "Mr. Bean, the City of Tacoma has no suit to bring"—I said it emphatically,—“the ordinance has been passed, and if there is any suit to [78] be brought, the Tacoma Railway & Power Company will bring it.” I said that to him, and I think Judge Shackelford was present then. I waited and waited and never supposed for a moment that those gentlemen would let their thirty days run without bringing suit. These letters came in occasionally and Mr. Lawson or somebody would come in, and I instructed Mr. Lawson to have nothing to do with it, because I believed at that time as I believe now, that those letters and the constant applications of one kind or another were for the purpose of getting something by which the City would be em-

(Testimony of T. L. Stiles.)

barrassed by its proceedings under this ordinance, and I was determined that it should not be so, and, as I say, I waited until the very 29th day, when this suit was commenced, and I looked at the complaint at once, and I saw that the usual restraining order didn't accompany it. I say usual, because it is perfectly well known that almost anything in the way of a complaint in all courts, has with it a temporary restraining order or an order to show cause. There was nothing of that kind in the complaint, nothing in the way of a temporary restraining order, and I saw at once that the thing was formed and framed so it should drag along and I was determined that it should not drag along, and I prepared and filed my answer the next day, and I have here a certified copy of the record in that case, and I ask leave to file it as Defendant's Exhibit "C."

The certified copy of the record was objected to as incompetent and not binding upon the plaintiff. Objection was overruled, and the copy of the record was marked Defendant's Exhibit "C."

Witness further testified: "The day that I defined the position of the [79] City was when I said to these gentlemen that if there was any suit to be brought, it must be brought by the Tacoma Railway & Power Company. Whenever that was, whether it was sooner or later, that was the time I defined my position, and I do not believe I was called upon to define it before, although as I say, there was suggestion and hints that the City would bring suit but I never gave it any weight whatever."

(Testimony of T. L. Stiles.)

“Previous to April 21st, there had been some discussion as to determining whether the Company had a right to furnish power which would be transformed by a customer into voltage sufficiently low for light. But that was not the only point the Company was insisting upon. It also insisted that under the Public Service Act it was relieved of all those conditions of the franchise ordinance.

Q. At first, was it not the claim of the Company that so long as the Company sold the electricity at a voltage too high for light, and as long as the customer transformed it into a sufficient power for lighting on his own premises, that the Company was doing no act forbidden by the franchise. Wasn't that the claim of the Company?

A. Yes, that was the first thing that was mentioned.

Q. You recognized did you not, the distinction between the Company testing its right to do that, and if it proved wrong, you recognized the distinction between forfeiting its franchise on account of that, and the proposition of the Company wilfully violating the franchise, didn't you?

A. To my mind there is nothing there except a legal wilfulness. Of course, there was no such thing as a wilful act of one man striking another, but it was wilful in the sense that the Company was determined to go on in spite of the [80] ordinance provisions as it had been theretofore.

Q. But the point was about transforming the

(Testimony of T. L. Stiles.)

power, it was that the Company really wanted to test that legal right.

A. I do not believe so. I think that the Company simply wanted to be let alone.

Q. Now, you say that you do not think the Company was going [81] to allow the 30 days to run out without the suit. Now, the Company if it brought suit within the 30 days, whether it got an injunction or whether it did not get an injunction, if it lost in its contention its franchise would ultimately be forfeited, would it not?

A. No, sir, not necessarily because at that time the City could not have insisted upon a forfeiture at that time, but the Company then by yielding the lighting proposition could have saved the rest of its franchise, by yielding the lighting business, not the rest of it.

Q. Before it had a judicial decision that it did not have the right to do that?

A. No, sir, it was after the judicial decision. We got a judicial decision in 13 days, and the question could have been decided in 13 or 14 or 15 days after the 23d day of April, as it was after the 23d day of May.

Q. Now, the resolution was served April 23d, and therefore the 30 days in which the Company occupied a place of repentance lasted until May 23d?

A. Yes, sir.

Q. And the Company brought the suit on the 22d day of May? A. Yes, sir.

Q. And then the answer came in on the 23d day of May, claiming the forfeiture? A. Yes, sir.

(Testimony of T. L. Stiles.)

Q. Now, don't you think, Judge Stiles, dealing as the Company was with you, for whom the Company had entire respect, that the Company would have assumed that on the 23d day of May, one day after that ran out, that the franchise would not be forfeited? Suppose you were dealing with me. Would you not [82] have thought so? You would not have expected me to claim a forfeiture.

A. You must remember that 30 days was the 30 days grace prescribed by the ordinance. The time really comes on the 2d day of April, when the first resolution was passed. That is my construction of it. As far as the 23d day of May is concerned,—the resolution was passed on that day. There is technicality. That day Mr. Bean had a copy of it and sent you a copy of it saying it would be passed that day. Mr. Woods did not formally serve it until two days later. I did not know until this matter came into litigation that it had not been served for two days after it was passed.

Q. Now, I am going to ask you a pretty broad question: Having read the correspondence which took place between Mr. Bean and the City officials, and Mr. Bean and myself, did you not really think we were all relying upon each other, even though we were mistaken, and that considering the people on both sides, that there was an honest mistake there?

A. I think the appearances was of an honest mistake on the part of Mr. Bean until after the resolution of the 21st of April, was passed, but I cannot see how anybody could have been mistaken after that.

(Testimony of T. L. Stiles.)

Q. Even though he believed that the understanding was that instead of the City bringing the suit that the Company was to bring the suit, and that that was for the purpose of the Company being able to allege the threat?

A. It may have been his idea of the proper way to proceed, but he could not have thought that from anything that happened between him and me.

Q. He may have been mistaken, but can you see any reason [83] why on the 21st day of April, he would have written to me to that effect to mislead me?

A. I cannot because he certainly had nothing from me upon that subject, and his construction of the language of the resolution is a plain negative of the whole tenor of the resolution. It either meant that I was perpetrating a sham, or that it meant what it said, one way or the other.

Q. Do you recall the conversation with Judge Shackleford in reference to a restraining order?

A. I think he is quite correct about that. If I may explain, as I said a while ago, we know that restraining orders are a matter of course. If he had asked for one I would not have objected to it, because I expected to have the case tried at once, and the City would not have been suffering from any injunction.

Q. And really if the case had been expedited so that there could have been a speedy determination of the right of the City to take over the business, you would not have had any idea of having the power franchise forfeited? A. No, sir.

(Testimony of T. L. Stiles.)

Q. And, as a matter of fact, the City did sustain no damage by reason of the Company doing that lighting business from the 23d day of May until the 22d day of June, that could not have been made whole for a few dollars?

A. As far as money went, there was no great loss.

Q. And the Company offered to pay that?

A. Not as I know of.

Q. If the offer was made, you mean that it was not made to you?

A. It was not offered to me." [84]

[Testimony of L. H. Bean, Recalled for Plaintiff.]

L. H. BEAN, was recalled as a witness and testified that the total expense of the Tacoma Railway and Power Company in producing the revenue of \$30,000.00, would have been possibly \$18,000.00, or in that neighborhood. That the total income from all sources of the Tacoma Railway and Power Company for the twelve months commencing November 30th, 1914, was \$1,060,210.74; that that included income from power business. Witness testified that the interest on the mortgage bonds is paid by the fiscal agents of the Company, and that the treasurer of the Tacoma Railway & Power Company is located in Boston. He said he did not come prepared to state how much remittance was made to the Treasurer in Boston in 1914; that the rate of interest on the mortgage is 5%. He also stated that the total floating indebtedness of the Tacoma Railway & Power Company on November 30th, was \$2,810,702.21, in the shape of notes bearing either 6 or 8 per cent interest,

payable semi-annually. Witness stated that there had been no actual default in the payment of interest, although the earnings had not been sufficient to pay the interest on its floating debt.

The witness gave the following figures for 12 months: "Gross earnings, \$1,060,210.74; Operating expense, \$758, 485.93; taxes; \$85,220.24; interest charges, \$274,855.66; leaving a net deficit of \$58,351.-09. The interest on the floating debt was about \$199,000.00. This sum does not include open accounts. Witness was not able to tell whether he had remitted to Boston \$140,000.00 for the payment of interest on these notes, because it is necessary for the Company to carry a working balance, and witness stated that he would have to [85] look into the books to see what amount was actually remitted. That the working balance kept on hand usually runs from \$50,000. to \$100,000.00." [86]

**[Order Directing Transmission of Original Exhibits,
and Approving and Settling Statement of Evidence.]**

United States of America,
Western District of Washington,—ss.

Now, on this 13th day of April, 1915, this cause coming on regularly before the Court upon application for the settling, certifying and approving of the proposed statement of the evidence, lately filed herein, and the time for such settling, approving and certifying of said statement having been duly extended by orders of the Court, and by the stipulation of the

parties, until and including this day, and the parties having agreed in regard to the said statement, and the amendments agreed upon having been incorporated and embodied in said statement pursuant to stipulation of the parties, and said statement having been written anew and it appearing that such statement contains the substance of all the testimony and evidence heard and taken at said trial, except certain exhibits introduced in evidence and marked Plaintiff's Exhibits 1 and 1-A, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 and Defendant's Exhibits "A," "B" and "C," which said exhibits are hereby made a part of said statement, and [87] the clerk is hereby directed to send up the original exhibits as a part of the record.

IT IS FURTHER ORDERED that said statement filed in the cause as the same now stands amended as aforesaid, with the exhibits aforesaid be and it is hereby approved and settled as a true statement of the evidence in this cause, and the same as so settled and approved is hereby certified by the undersigned, a Judge of the said court, and said statement is made a part of the record on appeal in said cause.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Apr. 13, 1915. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [88]

Judgment.

The above-entitled cause having come on to be heard on the 9th day of January, 1915, upon the bill, answer and proofs of the parties. Present: Mr. James B. Howe, for plaintiff, and Mr. T. L. Stiles, for defendant; thereupon was taken under advisement. And now, the Court having rendered and filed its decision adjudging that upon the pleadings and the evidence plaintiff is entitled to no relief herein.

IT IS ORDERED AND ADJUDGED that this action be dismissed and that defendant have judgment against plaintiff for its costs herein.

And it is **FURTHER ORDERED** that the injunction pending the action, heretofore ordered, be dissolved, unless kept in effect by appeal and supersedeas bond within ten days.

Entered February 2d, 1915.

EDWARD CUSHMAN,

District Judge.

[Endorsed]: Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [89]

Petition for Appeal.

The above-named plaintiff, Old Colony Trust Company, conceiving itself aggrieved by the final decree entered in the above-entitled cause, on the 2d day of February, 1915, hereby appeals from said final decree to the United States Circuit Court of Appeals

for the Ninth Circuit, and prays that this its appeal from said final decree to the United States Circuit Court of Appeals be allowed, and that a transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals. The said Old Colony Trust Company, plaintiff and appellant, has filed herein its assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals upon said appeal.

And your petitioner will ever pray, etc.

OLD COLONY TRUST COMPANY,

Appellant.

By JAMES B. HOWE and

JNO. A. SHACKLEFORD,

Its Solicitors.

[Endorsed]: Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [90]

Order Allowing Appeal.

On motion of James B. Howe and John A. Shackelford, solicitors for the above-named plaintiff, and upon the filing and presentation of a petition for an appeal from the final decree entered herein on the 2d day of February, 1915, and an assignment of errors duly filed herein, it is

ORDERED that the appeal prayed for be and the same is hereby allowed from said final decree to the

United States Circuit Court of Appeals for the Ninth Circuit;

And it is FURTHER ORDERED that the amount of the bond upon said appeal be and the same is hereby fixed in the sum of Twenty-five Thousand dollars (\$25,000.00).

It is FURTHER ORDERED that the temporary injunction upon the approval of said bond heretofore granted shall remain in force until the final hearing and determination of the cause on appeal.

It is FURTHER ORDERED that a certified transcript of the record and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 2d day of February, 1915.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [91]

Assignment of Errors.

Now comes Old Colony Trust Company, plaintiff in the above-entitled cause, and files the following assignment of errors, upon which it will rely on its appeal from the decree entered herein on the 2d day of February, 1915, in the above-entitled cause.

The United States District Court for the Western District of Washington, Southern Division, which entered a decree of dismissal in the above-entitled cause erred as follows:

I.

The Court erred in holding that any ground existed or was proved authorizing the forfeiture of the franchise granted by Ordinance No. 2295 of the City of Tacoma.

II.

The Court erred in holding that the sale of electric current by Tacoma Railway & Power Company to Northern Pacific Railway Company at a voltage too high to be used for lighting purposes, and the transformation of such current to a lower voltage by the Northern Pacific Railway Company, and the use of such current by Northern Pacific Railway Company on its own premises, for lighting purposes, constituted a ground of forfeiture of such franchise.

III.

The Court erred in holding that the proceedings of the City of Tacoma to forfeit such franchise, had and taken without notice to Old Colony Trust Company, could be effectual to forfeit such franchise or any rights of Old Colony Trust Company.

IV. [92]

The Court erred in holding that Old Colony Trust Company as trustee lost any rights in such franchise or in the property used under such franchise by reason of any proceedings on the part of the City of Tacoma.

V.

The Court erred in holding that the franchise granted by Ordinance No. 2295 of the City of Tacoma was subject to forfeiture by reason of the sale of electric power by the Tacoma Railway & Power Company to the Northern Pacific Railway Company before or after the 22d day of April, 1913.

VI.

The Court erred in holding that Old Colony Trust Company was not entitled to relief restraining the City of Tacoma from asserting forfeiture of the franchise granted by Ordinance No. 2295, and also restraining the City of Tacoma from asserting title to or interfering with the poles and wires used thereunder.

VII.

The Court erred in construing Ordinance No. 2295 as authorizing the forfeiture of the franchise granted thereby because of a sale of electric current used for lighting purposes.

VIII.

The Court erred in holding that the City of Tacoma had power, by its charter or by ordinance, to prevent itself from granting a franchise for the sale of electric power for lighting purposes.

IX.

The Court erred in holding that the acts of the City of Tacoma and of its officials in reference to the forfeiture of the franchise granted by Ordinance No. 2295 were not sufficient [93] to justify the officials of the Tacoma Railway & Power Company in believing that the franchise would not be forfeited for the

sale of power by the Company to the Northern Pacific Railway, and were not sufficient to estop the City of Tacoma from claiming such forfeiture.

X.

The Court erred, after holding that the Tacoma Railway & Power Company did believe that such franchise would not be forfeited by the City of Tacoma pending litigation thereover, is not holding that the acts of the City of Tacoma and its officials did not estop the City of Tacoma from claiming such forfeiture, and also erred in not holding that such forfeiture, if allowed, would be the result of error and mistake.

XI.

The Court erred in not entering a decree in the case in favor of the plaintiff as prayed in the Bill of Complaint.

XII.

The Court erred in rendering and entering a decree dismissing the cause.

XIII.

The Court erred in not holding that to adjudge a forfeiture of the franchise granted by Ordinance No. 2295 because of a sale by the Tacoma Railway & Power Company of electric current to the Northern Pacific Railway Company at a voltage too high to be used for lighting purposes and a transformation of such current by the Northern Pacific Railway Company upon its own premises to a voltage sufficiently low for lighting purposes, and the use thereof or some portion of such power by the Northern Pacific Railway Company was not a ground of forfeiture, and

that a forfeiture under such circumstances would [94] deprive plaintiff of its property without due process of law and deny to it the equal protection of the law, in contravention of the Fourteenth Amendment of the Constitution of the United States, and in contravention of the Constitution of the United States.

XIV.

The Court erred in holding that the rights of the plaintiff in the franchise granted by Ordinance No. 2295 of the City of Tacoma, and in the property used thereunder, could be taken from the plaintiff without notice to or any proceeding against the plaintiff.

XV.

The Court erred in not holding that to deprive the plaintiff of the relief prayed for in the Complaint, because of acts not done by the plaintiff and without any notice or knowledge on the part of the plaintiff, would deprive the plaintiff of its property without due process of law.

WHEREFORE, in order that the foregoing Assignment of Errors may be and appear of record, the plaintiff presents the same to the Court, and prays that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided; and plaintiff prays that said decree of dismissal be reversed, and that a decree in favor of the plaintiff be entered by the Court.

JAMES B. HOWE,
JNO. A. SHACKLEFORD,
Solicitors for Plaintiff.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [95]

Bond on Appeal.

WHEREAS, plaintiff in the above-entitled cause procured a temporary injunction against the defendant and whereas, the said plaintiff has appealed from the judgment entered in said cause, to the Circuit Court of Appeals, and;

WHEREAS, in the order allowing an appeal it is provided that plaintiff furnish a bond in the sum of \$25,000.00, and that upon the approval of said bond said temporary injunction should remain in force until the final hearing and determination of this cause upon appeal.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That we, Old Colony Trust Company, a corporation, plaintiff in the above-entitled cause, as principal, and UNITED STATES FIDELITY & GUARANTY COMPANY, as surety, acknowledge ourselves to be jointly and severally indebted to the City of Tacoma, the defendant in the above-entitled cause, in the sum of \$25,000.00. Now, if the said Old Colony Trust Company, appellant, shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make its plea good, and if said Old Colony Trust Company pay all damages and costs which may accrue by reason of the temporary injunction heretofore issued in said cause,

and by reason of said temporary injunction remaining in force until the final hearing and determination of this cause upon appeal, then this obligation shall be void, otherwise to remain in full force and effect, and the said surety hereby expressly agrees that in case of a breach of any condition of this bond, the District Court of the United States for the Western District of Washington, Southern Division, may, upon notice to it of not less than ten days, proceed summarily in the action in which [96] this bond is given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety, and to award execution therefor.

Tacoma, Wn., Febry, 2d, 1915.

OLD COLONY TRUST COMPANY.

By JNO. A. SHACKLEFORD,

Its Attorney,

Principal.

[Seal of Surety Co.]

UNITED STATES FIDELITY & GUAR-
ANTY CO.

By HARRY C. MILLER,

Surety.

Approved:

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Filed in the U. S. District Court,
Western Dist. of Washington, Southern Division.
Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M.
Harshberger, Deputy. [97]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return the foregoing to be a full, true, and correct copy of the record and proceedings in the above-entitled cause as the same remain on file and of record in my office, in said District, at Tacoma, pursuant to the stipulation of counsel herein filed.

I further certify that I attach hereto and herewith transmit the original Citation and original Order extending time for Record on Appeal, and under separate cover and certificate I transmit original exhibits herein.

I further certify that the following is a full, true and correct statement of all expenses, costs and fees, and charges incurred and paid in my office by or on behalf of the appellant, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return, 237	
folios @ 15¢.....	\$ 35.55
Certificate of Clerk to transcript of record 2	
folios @ 15¢.....	.30
Seal to said certificate.....	.20

Certificate of Clerk to original exhibits

folios @ 15¢..... .15

Seal to said Certificate..... .20

\$ 36.40

[98]

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said District Court, at Tacoma, in said District, this 13th day of April, A. D. 1915.

FRANK L. CROSBY,

Clerk.

By E. C. Ellington,

Deputy Clerk. [99]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. —.

OLD COLONY TRUST COMPANY,

Plaintiff,

vs.

THE CITY OF TACOMA,

Defendant.

Citation.

The United States of America, to the City of Tacoma and T. L. Stiles, its Solicitor, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, in the City of San Francisco, California, within thirty (30) days from and

after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Southern Division, wherein Old Colony Trust Company is appellant and you, the City of Tacoma, are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Southern Division, this 2d day of February, 1915.

[Seal]

EDWARD E. CUSHMAN,

United States District Judge for the Western District of Washington. [100]

Due and proper service of the above and foregoing Citation is hereby accepted and acknowledged, this 2d day of February, 1915.

T. L. STILES,

Solicitor for the City of Tacoma, Defendant and Appellee.

[Endorsed]: No. 18—E. In the United States District Court, Western District of Washington, Southern Division. Old Colony Trust Co., Plaintiff, vs. City of Tacoma, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

OLD COLONY TRUST COMPANY, a Corpora-
tion,

Appellant,

vs.

CITY OF TACOMA,

Appellee.

**Order [Extending Time to File Statement of
Evidence, and to File Record in Appellate Court].**

Upon stipulation of the parties to this cause, it is ORDERED that the time for serving and filing the statement of the evidence in this cause be extended thirty days from the date of this order, and that the time for settlement of such statement be extended forty days from the date of this order, and that the time for filing the record in this cause in the Circuit Court of Appeals be extended sixty days from the date of this order.

Dated this 24th day of February, 1915.

EDWARD E. CUSHMAN,
Judge. [101]

[Endorsed]: No. —. In the United States Circuit Court of Appeals, 9th Circuit. Old Colony Trust Company, Appellant, vs. City of Tacoma, Appellee. Order. Filed in the U. S. District Court, Western District of Washington, Southern Division. Feb. 24, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2601. United States Circuit Court of Appeals for the Ninth Circuit. Old Colony Trust Company, as Trustee, Appellant, vs. The City of Tacoma, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.
Filed April 16, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

8
No. 2601

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY, as Trustee,

Appellant,

v.

CITY OF TACOMA,

Appellee.

BRIEF OF COUNSEL FOR APPELLANT

Upon Appeal From the United States District Court for the
Western District of Washington, Southern Division.

JAMES B. HOWE, Seattle, Washington,
JOHN A. SHACKLEFORD, Tacoma, Washington,
Counsel for Appellant.

Filed
LOWMAN & HAMFORD CO., SEATTLE

OCT 1 2 1915

F. D. Monckton,

No. 2601

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY, as Trustee,

Appellant,

v.

CITY OF TACOMA,

Appellee.

BRIEF OF COUNSEL FOR APPELLANT

STATEMENT.

This appeal presents the following question:

SHALL A DECREE IN EQUITY BE AFFIRMED WHICH DISMISSED THE BILL OF AN INNOCENT MORTGAGEE TRUSTEE, FILED TO PROTECT FROM FORFEITURE TRUST PROPERTY SUBJECT TO THE LIEN OF ITS MORTGAGE, WHEN THE ALLEGED RIGHT TO FORFEIT IS BASED UPON ACTS OF THE MORTGAGOR, DONE IN GOOD FAITH AFTER THE EXECUTION OF THE MORTGAGE, AND WHEN THE MORTGAGEE WAS NOT A PARTY TO THE PROCEEDING TO FORFEIT AND HAD NO NOTICE OR KNOWLEDGE EITHER OF SUCH PROCEEDING OR OF ANY ACT UPON WHICH SUCH PROCEEDING WAS FOUNDED?

The appeal in this case is from a decree dismissing the bill of appellant, filed to enjoin appellee from

asserting the forfeiture of a franchise, and from asserting title to a certain electric power line operated thereunder in the City of Tacoma. The franchise and power-line involved were and are subject to the lien of a mortgage executed to appellant as trustee by the Tacoma Railway & Power Company, hereinafter called the Power Company, to secure bonds of the Power Company duly issued and now outstanding to the amount of \$1,300,000. The franchise was granted to the Power Company by the City of Tacoma by Ordinance 2295, approved February 9, 1905, and the power line was thereafter constructed and operated thereunder. In 1913 a controversy arose between the Power Company and appellee. The Power Company was then selling electric power to the Northern Pacific Railway Company, hereinafter called the Railway Company, at a voltage of 2,300 volts, which voltage was too high for lighting purposes. The Railway Company, on its own premises, transformed some of such power to a lower voltage and used it for lighting purposes. Appellee claimed that the sale of power by the Power Company to the Railway Company, and the transformation of a portion of such power into light, constituted a violation on the part of the Power Company of the provisions of the franchise granted to the Power Company, which provided that the grantee should not—

“Supply electric current to be used, directly or indirectly, for lighting purposes or to run motors, dynamos or other machines by which electric current shall be generated for lighting

purposes, to any firm, association or corporation."

The Power Company claimed that the act of the Railway Company in transforming the power after its purchase from the Power Company constituted neither a breach of the franchise nor a failure on the part of the Power Company to perform any obligation imposed by the franchise. The Power Company instituted suit against appellee in the Superior Court of the State of Washington for Pierce County, to enjoin appellee from forfeiting the franchise, and to protect itself in its right to sell power to the Railway Company. In its answer and cross-complaint, appellee in the suit in the state court because of such sale and use of power, claimed a forfeiture of the franchise. The state court adjudged a forfeiture. Appellant was not a party to any step taken to forfeit the franchise, and had neither notice nor knowledge of any such step. Appellant then instituted this suit to enjoin appellee from asserting the forfeiture of the franchise and from claiming title to the power line, and also to remove appellee's claim of forfeiture as a cloud on the title to the mortgaged franchise and power line. The decree appealed from denied appellant all relief and dismissed appellant's bill of complaint with costs. (pp. 3-30, 35-54, 100.)

SPECIFICATIONS OF ERROR.

Appellant for the reversal of the decree specifies and relies upon the following errors therein:

1. The decree is erroneous in dismissing the bill.
2. The decree is erroneous in holding that the sale of power by the Power Company to the Railway Company at a voltage too high for lighting purposes, and the reduction of the voltage and transformation of the power into light by the Railway Company, constituted ground for forfeiture of the franchise, either against the Power Company or appellant.
3. The decree is erroneous in holding that a forfeiture of the mortgaged property by steps and proceedings to which appellant was not a party and of which it had neither notice nor knowledge, was not void because depriving appellant of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.
4. The decree is erroneous in holding that the franchise granted by Ordinance 2295 of the City of Tacoma was subject to forfeiture because of the sale of power for lighting purposes.
5. The decree is erroneous in holding that the City of Tacoma had power to prevent its legislative authority from granting a franchise for the sale of eletric power for lighting purposes, thus creating a monopoly in the lighting business in favor of the city.
6. The decree is erroneous in holding that the prohibition against the sale of power for lighting purposes, contained in the franchise, was not void.

7. The decree is erroneous in holding that an innocent mortgagee should be denied all equitable relief in a suit instituted to protect the mortgaged property, because its mortgagor, while in good faith litigating to protect asserted contract rights, and believing that no forfeiture would be claimed pending such litigation, was mistaken in such belief.

8. The decree is erroneous in holding that the Power Company, while acting in good faith in the assertion of contract rights which it claimed, was not justified in believing that appellee would not attempt to forfeit the franchise until after a determination of what the contract rights of the parties to the franchise were.

9. The decree is erroneous in holding that an innocent mortgagee trustee should be deprived of its rights and be denied the protection of a court of equity in a suit to protect the trust property by construing covenants as conditions of forfeiture, and effecting such forfeiture because of acts of the mortgagor done after the execution of the mortgage.

10. The decree is erroneous in holding that the power line became the property of appellee, and that appellant was not entitled to have its mortgage lien thereon protected.

ARGUMENT.

The specifications of error may for convenience be grouped in the propositions hereinafter stated:

I.

(Specifications 1, 2, 3, 7, 8.)

THE DECREE IS ERRONEOUS IN HOLDING THAT ALL EQUITABLE RELIEF SHOULD BE DENIED TO AN INNOCENT MORTGAGEE TRUSTEE SEEKING TO PROTECT ITS TRUST ESTATE FROM FORFEITURE CLAIMED BECAUSE OF ACTS DONE BY THE MORTGAGOR AFTER THE EXECUTION OF THE MORTGAGE IN GOOD FAITH WITHOUT NOTICE TO OR KNOWLEDGE OF THE MORTGAGEE TRUSTEE, AND UNDER THE BELIEF THAT THE LITIGATION BASED THEREON CONSTITUTED A TEST CASE FOR DETERMINING WHETHER THE MORTGAGOR HAD OR HAD NOT THE RIGHT TO DO SUCH ACTS.

In presenting its case to the court, appellant was entirely free from embarrassment by reason of the controversy and litigation between appellee and the Power Company. The decree of the district court, while recognizing such rule to be the law, nevertheless applied the decision of the state court to appellant in the same manner as though appellant were upon certain points bound thereby. This course denied to appellant the benefit of the rule announced by the Supreme Court of the United States:

“The Trust Company’s rights and those of the bondholders whom it represents, were not acquired during or since that suit, but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other. *Keokuk & Western R. R. Co. v. Missouri*, 152 U. S. 301, 313. *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296.”

Old Colony Trust Co. v. Omaha, 230 U. S. 100, 122.

“The mortgage under which the complainant is the trustee, was executed before the suit in

the state court was begun, and we think there is no reason why a mortgage of property interests such as the street grants claimed by the mortgagor company should be concluded by a decree to which only the mortgagor was a party, than if the mortgage had been on a different character of estate. *Baltimore Trust & Guaranty Company v. Mayor etc. of the City of Baltimore*, 64 Fed., 153.

“The learned counsel for the city have not relied upon the decree of the state court as an adjudication binding upon complainant, but they have insisted that the opinion of the Ohio Supreme Court in the case of *City of Cincinnati v. Cincinnati Inclined Plane Railway Company* is to have much the same effect, and as effectually prejudices the question here involved as if the city of Cincinnati had made the present complainant a party defendant to that suit. The contention is that it is the duty of this court to accept that opinion as a conclusive construction of the charter powers of the city of Cincinnati and of the Cincinnati Inclined Plane Railway Company, and likewise a conclusive interpretation of the scope, effect and duration of the various contracts or ordinances under which the mortgaged easements and franchise originated. If this be true, the constitutional right of the complainant as a citizen of a state other than Ohio to have its rights as a mortgagee defined and adjudged by a court of the United States is of no real value. If this court cannot for itself examine the street contracts and determine their validity, effect and duration, and must follow the interpretation and construction placed on them by another court in a suit begun after its rights as mortgagee had accrued, and to which it was not a party, then the right of such a mortgagee to have a hearing before judg-

ing and trial before execution is a matter of form, without substance.”

Louisville Trust Co. v. City of Cincinnati, 76 Fed., 296, 300.

In the case just cited, the opinion was by Judge Lurton, afterward Mr. Justice Lurton of the Supreme Court of the United States, and was concurred in by Judges Taft and Hammond, sitting in the Circuit Court of Appeals for the Sixth Circuit. The opinion was also cited with approval in *Old Colony Trust Co. v. Omaha*, 230 U. S., 100.

“When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case although a different interpretation may be adopted by the state courts after such rights have accrued.”

Burgess v. Seligman, 107 U. S. 20, 27;

Board of Commissioners v. Coler & Co., 190 U. S. 437;

Board of Supervisors v. Smith, 111 U. S. 563.

“This decision of the highest court of the state was made after the rights of the Southern Railway Company, whatever they may be, had accrued, in the property and franchise of the Western North Carolina Railroad Company, and, while entitled to the highest respect and consideration, is not conclusive upon this court in determining the rights secured to the purchaser under the decree of foreclosure in the Federal Court.”

Julian v. Central Trust Co., 193 U. S. 103.

The district court, in the case at bar, was therefore in error in holding that the construction placed upon the state statutes by the state court in the litigation between the Power Company and appellee was binding upon the district court.

It is therefore submitted that appellant stood in the district court, and now stands in this court, in the same position as though no litigation had taken place in the state court. If this proposition is sound, then the question arises, whether a court of equity upon the record in this case could rightly deny to appellant protection against the forfeiture of the property mortgaged to appellant for the benefit of the bondholders of the Power Company.

The facts upon which this proposition rests are clear. Appellee, in 1905, by Ordinance 2295, granted the Power Company the franchise in controversy. Appellee claimed that the franchise not only did not authorize the Power Company to sell power for lighting purposes, but also that if the Power Company sold power which the purchaser transformed into light, the act of the purchaser in transforming the power into light rendered the franchise subject to forfeiture. The Power Company claimed that its franchise authorized it to sell power, and that its sale of power at a voltage too high for lighting purposes was not a violation of the franchise, and that what the purchaser did with the power could not be converted into a breach on the part of the Power Company. The Power Company also claimed that the Public Service Commission law

of the state, enacted in 1911, required it to serve anyone desiring to purchase power, with power. Whether the contention of the Power Company was correct or incorrect, there is no doubt that there was a dispute between the parties, maintained in good faith on each side. That dispute related to the meaning of the franchise and to the obligations and duties of the Power Company under the Public Service Commission law of the state. Appellee, if it believed that the Power Company was selling current in a manner not authorized by its franchise, and was thereby exercising franchise privileges not granted to it, could by injunction have prevented a continuance of its act. Or, if appellee did not desire to be the actor, it could have made a threat of forfeiture, and the Power Company could have instituted suit to prevent the execution of the threat. Neither course would have required the Power Company to give up in advance of a determination of the questions in controversy, a service which it believed it had a right to perform. The situation, after the controversy arose, which was presented, was as follows: About April 3, 1913, the manager of the Power Company called on the Commissioner of Light and Water of the City of Tacoma, and informed him that while the Company felt that it was not obliged to give up the business of serving the Railway Company with power, nevertheless the Power Company would not take any chance of losing its franchise, and if the city was prepared to take over the entire service to the Railway Company

which the Power Company was then rendering, it would turn such service over to the city. The language of the manager of the Power Company on this point is so clear that it will be here quoted:

“The resolution revoking the permit (not the franchise) was passed on the second day of April, 1913, and the next morning I called on the Commissioner of Light and Water and told him that while we did not feel that the company was obliged legally to give up the business, we did not want to take any chance whatsoever in connection with our franchise, and we were prepared at that time to turn the total business of the Northern Pacific Railway over to him, if he was prepared to take it over. (p. 59) * * *

“He said he wanted to think the matter over, as to whether I—whether we—should continue to supply the Northern Pacific, and that he would talk to me again about it. I called on him, I believe it was the next day, and had another talk with him, and he said that the city wanted the Tacoma Railway & Power Company to continue to supply the Northern Pacific Railway Company. I told him that we could not afford to do this unless the necessary steps were taken to protect our franchise in the matter, and that I would write him a letter setting forth the company’s position and willingness to continue to supply the current, provided the necessary steps were taken to protect us. That was on the 4th day of April, that I wrote a letter and took it to the Commissioner of Light and Water, and he said he thought it was all right, and I suggested that we go and talk to the city attorney about it.” (p. 60.)

On April 16, the manager of the Power Company

drafted a letter to be sent to the Commissioner of Light and Water, as follows:

“Referring to the matter of Tacoma Railway & Power Company furnishing electric current to the Northern Pacific Railway Company, which you understand is being used for lighting purposes, and which the city, as we understand, is to bring an injunction suit to prevent us further furnishing,—I beg to advise you that we will be willing, pending the adjustment of this suit and the determination of the right of the city and the Tacoma Railway & Power Company in the matter,—to continue to supply, and hereby agree to continue to supply, said current until the city is ready to take the business over, provided such arrangements are made with the Northern Pacific Railway Company, and providing the consent of the Commissioner of Public Works is had for the continuance of the same to this arrangement.” (Plaintiff’s Exhibit 12.)

On the same date, the manager of the Power Company wrote to the general counsel of the company as follows:

“I am enclosing a letter which I have drawn up with reference to continuing to furnish the Northern Pacific Railway Company with electric current, pending adjustment of the matter through the courts, which I will be pleased to have you make such changes in as you think necessary. I would rather like, if you think it would not have any effect, to leave out the following, in the latter part of the letter: ‘Provided such arrangements are made with the Northern Pacific Railway Company.’ I have the matter in such shape now that I believe we will be able to get it through without trouble at Monday’s legislative meeting. I forgot to

tell you over the telephone that I talked this over with the city attorney, and he agreed that the best way out of it was for the city to bring an injunction suit. I hope he doesn't change his mind before Monday." (Plaintiff's Exhibit 11.)

The same witness testified as follows:

"This is a letter (referring to Exhibit 11), dated April 16, to Mr. James B. Howe, and was written, enclosing a copy of a letter which had been drawn up with reference to continuing the furnishing of the Northern Pacific Railway with electric current pending the adjustment of the matter through the court, and was written after I had a talk with the city attorney in which he had suggested that the best thing was for the city to bring an injunction suit—to prevent the company from furnishing the current as it was furnishing it to the Northern Pacific Railway Company." (p. 61.)

The Commissioner of Light and Water of the City of Tacoma testified that the manager of the Power Company had called on him in reference to the matter, and the witness then testified.

"I told him it was a legal question, that I had nothing to do about that, and that he had better go to see Judge Stiles, and we went in there to see you (Judge Stiles), and you said the same thing,—that it was a thing that had to be threshed out by the courts. It was not for me to say. I had no power to give any concessions one way or the other. (p. 82) * * *

Q. Do you remember whether there was any talk about who should bring suit to thresh out this matter?

A. Yes sir.

Q. What did Mr. Shackelford want?

A. He wanted the city to bring suit.

Q. Do you remember what I told him.

A. Yes sir.

Q. What was it?

A. That the company would have to bring the suit. (p. 83.)”

On the 17th of April, 1913, counsel for the Power Company, answering Exhibit 11, wrote to the manager of the Power Company as follows:

“I return draft of your letter of April 16 to Hon. Nicholas Lawson, Commissioner of Light and Power of Tacoma. I have interlined in pencil certain amendments which, if you see no objection to inserting, I think it would be wise to insert in your letter. If there is any objection to inserting the amendments which I propose, then do not insert them, because I do not consider them vital; but I believe that if inserted, our position would be somewhat stronger than if the unamended draft of the letter is used. I attach a great deal of importance to the fact that the Tacoma Railway & Power Company is furnishing current for power and that it is the Northern Pacific Railway Company that changes the current so as to be used for light. I think it also well to make the letter clear that you are not simply agreeing to furnish the current until the city is ready to take over the business, but that the city is not to take the business over unless the court finally decides that the Tacoma Railway & Power Company is not entitled to do such business. I do not see any objection to leaving out the sentence ‘Provided such arrangements are made with the Northern Pacific Railway Company.’” (Plaintiff’s Exhibit 13.)

On April 18, 1913, the manager of the Power Company wrote to the general counsel as follows:

“I beg to acknowledge receipt of your letter of April 17, returning draft of letter to the Commissioner of Light and Water with reference to furnishing power to the Northern Pacific Railway. I have rewritten the letter, inserting the amendments which you suggested. I hope to get this through on Monday. A copy of redraft of letter is enclosed for your files.” (Plaintiff’s Exhibit 14.)

On April 21, 1913, the manager of the Power Company wrote to the general counsel of the company as follows:

“Judge Stiles has been figuring over the matter of the city bringing the injunction suit, and he says he has come to the conclusion that the city is not in a position to do it, as it is bound by its ordinances, and does not feel that the court would feel that it was necessary to bring a suit of that kind,—in view of the ordinance provisions. They will today, however, pass a resolution (a copy of which is enclosed) which, as you will note, orders the Commissioner of Public Works to serve notice on the company that they will repeal the franchise unless we cease furnishing the current for lighting within 30 days; and he says that the proper thing for us to do is to bring an injunction suit against the city to prevent the enforcement of this ordinance, and he says he will agree not to make any objection to a temporary order being granted, and then the matter can be carried along and disposed of in some way. I have agreed with the city attorney, Commissioner of Light and Water and Commissioner of Public Works, to continue furnishing the current as at present, until the matter is finally disposed of. The agreement is the same as copy sent you, although it will be necessary to change the wording with reference to the suit. As

you know, the only lighting current which we are furnishing that is being used to our knowledge, is that to the Northern Pacific Railway Company, and even in the event that we eventually should have to give up that lighting business, I have a plan by which we can keep the bulk of the Northern Pacific power business, amounting to probably \$19,000 per year. Please let me know if you think this will have the same effect as the city bringing the injunction suit.” (Plaintiff’s Exhibit 15.)

The general counsel on May 5th wrote the manager of the Power company as follows:

“I duly received yours in reference to the proposed suit by Tacoma Railway & Power Company against the city, concerning the power contract with the Northern Pacific Railway Company. I do not think the change of program materially affects the matter. I assume that Judge Shackelford will institute the suit. If I can be of any service in the matter I will be glad if you and Judge Shackelford will let me know.”

John A. Shackelford, formerly a judge of the Superior Court of the state for Pierce County, and at the time he testified attorney for the Power Company in Tacoma, testified as follows:

“I had several talks with Judge Stiles after the passage of the first resolution, the resolution revoking the permits to furnish light, which had been granted or were supposed to have been granted to the Tacoma Railway & Power Company. Some of these conversations were before the resolution of April 21 was passed. The first talk that I remember having, I talked with Judge Stiles about what method should be pursued with reference to determining the right of the Tacoma Railway & Power Company to furnish electricity to the Northern Pacific, part of

which electricity was used by the Railway Company for lighting purposes. In the course of that talk I remember I made the suggestion that it might not be possible for the company to bring an injunction suit to enjoin the passage of an ordinance forfeiting the franchise. I told Judge Stiles that we were anxious not to endanger the franchise in any way, but we wanted to make some kind of an arrangement about the suit so that the rights of the parties could be determined, and the talk then followed along the line of the city bringing a suit to enjoin the Tacoma Railway & Power Company from furnishing electricity to a consumer, in this instance the Northern Pacific Railway Company, which consumer used the electricity for lighting purposes. I cannot remember exactly what was said at the conversation, but I remember very well that at that time the idea of both myself and Judge Stiles, as expressed in the conversation, was along the line of the city bringing an action. After the second resolution was passed, which contained a threat of forfeiture, I had a talk with Judge Stiles, and I think that Mr. Bean was present at the time. I remember saying to Judge Stiles at that time that I supposed that if the city wanted to put the Tacoma Railway & Power Company out of the power business, that it could probably find some way in which to do so; but it seemed to me a very ill-advised course to pursue, especially in view of the fact that the supply of electricity from the city's own plant was comparatively small. Judge Stiles at that time said that it was not the intention of the city, that he was sure that the city had no idea of putting us out of business, that it wanted to get the lighting business, to protect the lighting business. A day or two before the suit was brought in the state court by the Tacoma Railway & Power Company, Mr. Bean and I went into Judge

Stiles' office together, in regard to getting some written statement in regard to the course to be pursued while the suit was pending with reference to the way the Northern Pacific should be supplied. One of the letters written by Mr. Bean to Mr. Lawson—I do not recall at this time which one it was, but it was one of the letters that was called to Judge Stiles' attention. Judge Stiles then said that he would not agree to the signing of that letter. Mr. Bean said to him, 'Well, when this letter was brought in by Mr. Lawson and myself, you said it was all right.' Judge Stiles said, 'Yes, it is all right. It is a statement made by you there. It is all right in a way, but I won't consent to sign it, because it seems to me that if it was signed it would be a complete defense to any objection that the city might make to the furnishing of power to the Northern Pacific.' I cannot quote his exact words, but that is the substance of his statement at that time. He complained that the understanding had been in existence for some little while, that the company was to bring suit, and that we were delaying about bringing it, and said that if we did not bring one pretty soon he would start something. The next day I started suit, but before I started the suit, I had that conversation with Judge Stiles, and I spoke to him about a temporary injunction in the case, which the company was to bring, and I asked him about fixing the time when we could take up the matter of a temporary injunction. I had not made any application for a restraining order, because I felt it would be better to have some notice in the matter, that the company would be better satisfied to have notice given and a temporary injunction, instead of an *ex parte* restraining order. Judge Stiles said it was not his intention to object to an injunction during the suit, and that if I would send the papers down to him when they

were prepared, that he thought he could get the temporary injunction order entered without any hearing. The complaint in the suit was prepared, and I think, was filed on the 21st of May, 1913, and I believe service was not had on the mayor until the next day. In addition to serving the mayor, as I remember it, I sent down a copy to Judge Stiles. The next day, Judge Stiles sent in his answer and cross-complaint, in which he prayed a forfeiture of the franchise, among other things, and sent me word that he was not willing to consent to a temporary injunction, but wanted to insist on a trial of the case before Judge Easterday within the next few days. I made no objection to the early trial of the case, and the case was tried a few days afterward, before Judge Easterday. Up to the time of the receipt of Judge Stiles' cross-complaint praying for a forfeiture of the franchise, and his refusal to consent to a temporary injunction during the meantime, I had not supposed and had not believed that the city intended to insist upon a forfeiture, although the resolution passed on the 21st day of April was a resolution giving notice that forfeiture would be claimed. I thought from the statement of Judge Stiles that it was not the desire of the city to put the company out of the power business, and from other reports that I received from officers at the city hall, that it was not the intention to insist upon any forfeiture; but Judge Stiles' answer, claiming the forfeiture came one day after the 30th day period was up in which we could have cut off the Northern Pacific. * * *

"Now, I do not want to be misunderstood as charging Judge Stiles with any intent or purpose to perpetrate any fraud on me or on the company. I do not want to be in the position of contending that he artfully set up a scheme by which we would be lulled into security in the

matter, and that he took advantage of us. In fact, I do not believe that; but the situation is this. When this matter started out, the understanding all around was that the matter of whether the company had a right to furnish current to a consumer who used a portion of it for lighting would be fought out without putting the company out of business, as it was sometimes expressed, or without any forfeiture of the franchise. When the change of front came on the part of the city about the matter, they can tell better than I can; but up until the expiration of the thirty-day period after the service of this last resolution, it was our understanding that it was not the purpose or intent of the city to put the company out of the power business. Now, whether it was just a misunderstanding between us or not,—I know that as far as I am concerned that is the way I understood it. * * *

I felt that we had a question which was one of doubt, and a question that should be determined by the proper tribunal, and that was the question whether the customer who buys current has the right to use it for any purpose that he sees fit—there was another question also, whether the passage of the Public Service law by the state legislature had not modified the franchise so as to make it our duty to furnish a customer with electricity when we could reasonably do so, and when he demanded it, no matter what use he proposed to make of it. In other words, I believe it was a case where we ought to have an opportunity not to be hung first, but to have a trial beforehand.” (pp. 75-81.)

Judge Stiles testified for the defendant, and among other things testified as follows:

“The day that I defined the position of the city was when I said to these gentlemen that if

there was any suit to be brought it must be brought by the Tacoma Railway & Power Company. Whenever that was, whether it was sooner or later, that was the time I defined my position, and I do not believe I was called upon to define it before, although, as I say, there were suggestions and hints that the city would bring suit, but I never gave it any weight whatever. Previous to April 21, there had been some discussion as to determining whether the company had a right to furnish power which would be transformed by a customer into voltage sufficiently low for light, but that was not the only point the company was insisting upon. It also insisted that under the Public Service Act it was relieved of all those conditions of the franchise ordinance.

Q. At first, was it not the claim of the company that so long as the company sold the electricity at a voltage too high for light, and as long as the consumer transformed it into a sufficient power for lighting on his own premises, that the company was doing no act forbidden by the franchise,—was not that the claim of the company?

A. Yes, that was the first thing that was mentioned.” (pp. 92, 93.)

* * * * *

“Q. Do you recall the conversation with Judge Shackelford in reference to a restraining order?

A. I think he is quite correct about that. If I may explain, as I said a while ago, we know that restraining orders are a matter of course. If he had asked for one, I would not have objected to it, because I expected to have the case tried at once, and the city would not have been suffering from any injunction.

Q. And really, if the case had been expedited, so that there could have been a speedy determination of the right of the city to take

over the business, you would not have had any idea of having the power franchise forfeited?

A. No sir.

Q. And as a matter of fact the city did sustain no damage by reason of the company doing that lighting business from the 23rd day of May until the 22nd (2nd) day of June, that could not have been made whole for a few dollars?

A. As far as money went, there was no great loss." (pp. 96, 97.)

The manager of the Power Company, on cross-examination, testified as follows:

"Q. When was it you say you first came to the city hall and had a talk with reference to that resolution?

A. The day after the resolution passed.

Q. On the third?

A. Yes sir.

Q. Then you came and talked to me?

A. I do not think that I came and talked to you on the same day, but it was the day following.

Q. Now, what did you say?

I said the Tacoma Railway & Power Company was willing and ready to turn over to the City the entire Northern Pacific Railway Company business, or any part thereof, and I explained the situation, the conditions of the wiring the different buildings of the Northern Pacific to the City, and I asked them if they were prepared to take it over. That was on April 3d. The Commissioner of Light and Water said he would have to look into the matter to see what condition they were in, and that he would talk to me about it again. The next day, the 4th day of April, I went to see him again and he said that the City was not prepared to take over the business of the Northern Pacific and he wished the Tacoma Railway

& Power Company would continue to supply them, and that he would protect us in any way that was necessary, and he suggested that I should write him a letter and have his consent and the consent of the Commissioner of Public Works to the continuation of the supply." (70.)

The witness stated he did not go to the City Council because he first wanted to straighten out the details with the Commissioner of Light and Water, and get it legally right before he went to the Council. That his idea was to get an agreement for the Tacoma Railway & Power Company to continue to supply the Northern Pacific with power until the controversy with the City was settled, and that he explained his purpose very frankly. That he felt if he went to the Council first that the matter would be referred to the city attorney and it would be necessary to retrace his steps and go over it again, that the reason the letter dated April 18th was not written earlier was that a letter had been prepared and shown to Judge Stiles and that Judge Stiles had said the letter was all right, and the witness was attempting to get it signed. That Judge Stiles said there was no reason for apprehension, and that the City had no intention of doing anything to void the franchise, and that the city attorney had said it was a matter of form and that it was all right for us to continue to supply the Northern Pacific and that witness kept insisting on a letter so the records in the matter would be clear.

“Q. That is the reason you wrote this letter of the 18th?

A. Yes, sir, absolutely.

Q. And you endeavored to get Mr. Lawson and Mr. Woods to sign it?

A. Yes, sir.

Q. Isn't it a fact that I would not let them sign it?

A. You never said to me absolutely. You said it was all right, but I know you would not give your consent. (71.)

Q. Explain why you should write a letter suggesting that you were willing to do a thing which you were already bound to do if you had any right?

The Tacoma Railway & Power Company had a contract with the Northern Pacific for the supplying of electric power, and a portion of that power, we understood, had been used for lighting. The city claimed we had no right to furnish this power, which was in turn converted by the Northern Pacific into use for lighting. I felt that that was not the proper position for the city to take; however, we felt that we did not want to jeopardize our property or franchise rights, and wanted to take whatever precaution was necessary to protect ourselves, and at the same time we did not want to lose the business unless it was necessary. But we were willing to give the business to the city, or pay them an equivalent amount, or buy the same amount of power until the matter was adjudicated through the courts. It was for the purpose of preserving the record and protecting ourselves and taking absolutely no chances with our franchise that I, as you say, ‘haunted the city hall,’ and endeavored to get a written agreement with some of the city officials, and they had assured me that there was no intention on the part of the city of doing anything of that kind.” (p. 72.)

Upon being interrogated as to what the witness thought the resolution of April 21 meant, he answered Judge Stiles as follows:

“You gave me a copy of that resolution, I believe, on the 21st of April, and I sent it to Mr. Howe, and I believed that that resolution was being introduced for the purpose of giving the company some basis for action to test out its rights in the matter, as previous to that time you and I and Judge Shackelford talked the matter over and you told me you did not believe it was proper for the city to bring an action against the company, and I supposed that this was to give the company some basis for bringing action against the city, and we proceeded at that time on that theory. It was at my procurement resolution 6161 was passed.” (p. 74.)

The suit by the Power Company was filed on the 22nd day of May, 1913. Up to and inclusive of that day, if the Power Company had cut off service from the Northern Pacific Railway Company, its franchise would have been unimpaired; there would have been no ground for forfeiture.

The complaint of the Power Company against appellee prayed:

“For a temporary injunction enjoining the defendant during the pendency of this action from repealing said ordinance or declaring the same null and void, and enjoining the said defendant from claiming the forfeiture of the poles, wires or other property that have been located or constructed pursuant to said ordinance within the city of Tacoma, and from interfering with the use by the plaintiff of said poles, wires, appliances and other property in the same manner in which said plaintiff has

heretofore used the same, and that upon the final hearing of this cause said temporary injunction may by the decree of the above entitled court be made perpetual."

It is plain that the object of the complaint was to prevent appellee from repealing the franchise or declaring it null and void, because of the sale of power to the Northern Pacific Railway. The answer and cross-complaint of the city was filed May 23, and in the cross-complaint appellee asked a court of equity to adjudge the forfeiture of the franchise. The reply of the plaintiff was filed June 3, 1913, and the decree of forfeiture was entered June 14, 1913. (Defendant's Exhibit C.)

On June 2, 1913, appellee adopted the following resolution:

"Be it resolved by the council of the city of Tacoma: That pending the litigation between the city of Tacoma and the Tacoma Railway & Power Company over the forfeiture of the franchise granted by ordinance 2412 (2295), the city attorney be authorized to stipulate on behalf of the city with said company that the fact that said company continues from this date during the pendency of said litigation to furnish the Northern Pacific Railway Company with electric power in the same manner as heretofore, under said ordinance, shall not be taken or considered as an additional cause for the forfeiture of said ordinance and the franchises held thereunder, provided that from this date the Tacoma Railway & Power Company purchase from the City of Tacoma a quantity of electric power equal to the quantity it shall furnish to said Northern Pacific Railway Company during the pendency of said litigation, in the same manner and under the same regulations

and at the same price as other electric power consumers of said city. The purpose of this resolution and the proposed stipulation is to preserve to the Northern Pacific Railway Company its usual supply of electric power without any jeopardy or prejudice to the rights of either party to said litigation, and particularly that the city of Tacoma may not by the arrangement herein proposed waive any right to forfeit said franchise which has already accrued." (Plaintiff's Exhibit 4.)

A stipulation pursuant to the resolution was then filed in the state court, and on June 4, 1913, the manager of the Power Company entered into an agreement with the city to take the power from the city covered by the resolution of June 2, 1913, and the city not then being ready to furnish such power, the Power Company waived the date of making connection for its being furnished. (Plaintiff's Exhibits 6 and 7.)

The Power Company carried out its contract to purchase from the city at the city's rates an amount of power equal to the power sold by the company to the Northern Pacific after June 2, (p. 66.)

It will therefore be seen that the decree of the district court denied the mortgagee trustee relief against an asserted right to forfeit the mortgaged property because the Power Company asserted the right under its franchise to sell power to the Northern Pacific Railway and did sell power to the Northern Pacific Railway from May 22, 1913, to June 2, 1913, which power the Railway Company transformed into light, and because that during that time

appellee objected to the action of the Power Company. According to the contention of appellee, the franchise of the Power Company could not be forfeited because the Power Company furnished power to the Railway Company which the Railway Company transformed into light, unless such furnishing of power was done after May 22, 1913; and on June 2, 1913, appellee for valuable consideration waived its right to claim a forfeiture because of power so furnished on and after June 2, 1913, but undertook to reserve its right to insist on a forfeiture because of acts done between the 22nd day of May, 1913, and the 2nd day of June, 1913. The court will see, therefore, that the right is asserted in a court of equity to forfeit trust property where no damage has been caused to the party claiming the forfeiture, where the acts constituting the basis of forfeiture were not done by the trustee mortgagee, but by the mortgagor under an assertion of right and where the thing done was not a failure to perform, but was claimed by appellee to be something which the mortgagor had not been authorized to do.

Moreover, the Power Company was serving the Railway with electricity and section 33 of the Public Service Commission Law (Laws 1911, p. 561) provided that:

“Every * * * electrical company * * * engaged in the sale and distribution of * * * electricity * * * shall upon reasonable notice furnish to all persons and corporations who may apply therefor and be reasonably entitled thereto, suitable facilities for furnishing and

furnish all available * * * electricity as demanded."

Whether this law of 1911 required a continuance of service notwithstanding the franchise provision was certainly a matter which could not be resolved against the obligation without some doubt on the subject.

State ex rel Webster v. Superior Court, 67 Wash. 37;

Seattle Electric Co. v. Seattle, 206 Fed. R. 955.

Puget Sound Traction Light & Power Co. v. Reynolds, 223 Fed. R. 371;

State ex rel Case v. Howell, Wash. Dec., Vol. 43, p. 112.

Such being the case should an error of judgment be visited with forfeiture?

The district court found that the evidence showed:

"1. That the officers of the Tacoma Railway & Power Company were not acting in hostile defiance of the requirements of the resolution.

2. That the city was not prepared at this time to immediately take care of all of the needs of the Northern Pacific Railway Company being supplied by the Tacoma Railway & Power Company under its contract with that company.

3. That the officers of the Tacoma Railway & Power Company were acting under the belief that the city's officers, on account of the foregoing fact, would not insist upon a forfeiture pending an adjudication in court of the question that had arisen between the Tacoma Railway & Power Company and the city, even though the former did continue to furnish elec-

tric power under its contract to the Northern Pacific Railway Company of too high a voltage for light, but which was by the Northern Pacific Railway transformed on its own premises to a lower voltage and used for lighting purposes.

4. These officers of the Tacoma Railway & Power Company acted in the evident belief that the resolution of April 21 was to be treated as a threat of forfeiture, only as a step deemed—as they understood—by both the officers of the Tacoma Railway & Power Company and the city to be necessary in order to bring the matter into court for adjudication, and made without any real purpose on the part of the city or its officers to actually forfeit the franchise in pursuance of the resolution in case the company failed to comply with the requirements of the resolution within the thirty days therein provided.” (p. 51.)

It is respectfully submitted that upon the foregoing facts no rule of law applicable thereto will sustain a decree forfeiting the mortgaged property and destroying the trust property which appellant holds as security for the bondholders of the Power Company.

The language of Lord Esher, in replying to the address of the attorney general on the occasion of Lord Esher's retiring from the office of Master of the Rolls, is applicable to this case (*Police Powers*, Russell 3):

“The duty of the judge is to find out what is the rule to which people of candor and honor and fairness in the position of the two parties would apply in respect to the matter in hand. That is the common law of England, and there is no other law. It is not only the common

law, but if we go to equity, it is the same thing. The law of England is not a science, it is a practical application of the rules of right and wrong to the particular case before the court, and the canon of law is that that rule should be adopted and applied to the case which people of honor and candor and fairness in such a transaction would apply to each other. Now, if that be so, if any supposed rule of law is put forward which would prevent the rule of right being applied, the supposed rule of law must be wrong."

Is there any doubt that as between man and man, any judge would hesitate to say that under the circumstances of this case, candor and honor and fairness estop the city of Tacoma from depriving the bondholders of the Power Company of their security because of an act of the Power Company done in good faith and without the knowledge of the bondholders between the 22nd day of May and the 2nd day of June, 1913, and which caused no loss to the City of Tacoma? Any supposed rule of law put forward to uphold a forfeiture under the circumstances of this case is only a supposed rule of law, it is not one which, if examined, can be sustained.

"A written contract cannot be set aside merely because one of the parties to it put an erroneous construction on the words in which it was expressed, but this principle does not apply to a case where a mistake by one of the parties as to the meaning of the words used has been induced, however innocently, by the other."

Syllabus, Wilding v. Sanderson, L. R. 2 Ch. D. (1897) 534.

Hickman v. Berens, L. R. 2 Ch. D. (1895)
638.

Beauchamp v. Winn, 6 House of Lords 223.

Haviland v. Willetts, 35 N. E. 958.

Pomeroy Eq. Jur., 3rd Ed., Secs. 847-849, 860,
451, 452.

II.

(Specification 4.)

THE FURNISHING OF ELECTRIC CURRENT TO THE NORTH-ERN PACIFIC RAILWAY COMPANY, WHICH WAS TRANSFORMED BY THAT COMPANY INTO LIGHT, WAS NOT, UNDER THE PROVISIONS OF THE FRANCHISE, GROUND OF FORFEITURE.

Ordinance 2295 of the city of Tacoma, in Section 1, granted authority to the Power Company to construct and maintain a power line—

Section 1. "For the purpose of transmitting, distributing and selling electric current to be furnished and used for the purpose of furnishing power and heat or either of them, and the further right to charge for such current a reasonable compensation, and for any other use or uses to which electricity may be put except as hereinafter provided; provided, that neither said Tacoma Railway & Power Company nor its successors or assigns shall have any right to supply electric current to be used directly or indirectly for lighting purposes, or to run motors, dynamos or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association, or corporation, except where the grantee herein, its successors and assigns, may furnish current for street railway purposes, then and in that event current may be sold for lighting street cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway & Power

Company, its successors and assigns, the right to sell power for power and heating purposes, and for lighting street cars, but in no event except as hereinafter provided shall the said grantee, its successors or assigns, furnish power to be used for lighting or generating electricity for 'lighting.'"

Section 11. "That each and every right, privilege and authority and franchise by this ordinance granted, shall, without the passage of any resolution, ordinance or any action of any kind whatsoever on the part of the City of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns to perform any and all of the conditions in this ordinance specified and mentioned for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the Commissioner of Public Works of said city, under the direction and authority of the city council of said city, to the effect that said city will, if said failure is not corrected before the expiration of thirty days from the service of said notice, consider this franchise null and void and absolutely of no effect, because of the failure of said grantee, its successors and assigns, to perform any or all of the conditions in this ordinance specified. * * * "

Section 17. "This grant is subject to the right of the city council at any time on thirty days' written notice to said grantee, its successors and assigns, by the Commissioner of Public Works, authorized so to do, hereafter to repeal, change or modify this grant if the franchise granted hereby is not operated in accordance with the provisions of this ordinance or at all, and the city council reserves the right so to do, and this section shall be considered as cumulative and an additional remedy to that provided by section 11 of this ordinance."

Ordinance 2295 imposed numerous obligations upon the grantee requiring affirmative performance on its part, among which were the contributing to the cost of construction of bridges, the payment of a percentage upon gross receipts, and the contingent furnishing of electric current to the city.

It is submitted that the proper construction of section 1 is that the supplying of electric current for lighting purposes even at a voltage low enough for such purposes would not constitute a breach of any condition of the franchise, and the language used in section 1 was not intended to declare that such act would constitute a breach. The language was used for the purpose of making it clear that the franchise granted to the grantee was for the purpose of enabling it to furnish electric current for power and heat and, excepting light, any other use to which electricity might be put, but that no franchise was granted authorizing the grantee to furnish electric current for lighting purposes or to operate machines by which electric current might be generated for lighting purposes. If, therefore, the grantee furnished electric current for lighting purposes, the act would not constitute a breach of a condition of the franchise to furnish current for power and heat, but it would be an act which the grantee had been granted no authority to do. If an electric street railway company should have a franchise to operate street cars by means of electricity, it might have no power under such franchise to sell electricity for consumption. If it did sell elec-

tricity for consumption, and such sale was not authorized by the franchise, such act might be enjoined. Such sale, however, would not constitute ground for forfeiting the street railway franchise. A careful reading of section 1 makes it plain that the prohibition against furnishing electricity for lighting purposes was not intended to constitute a condition for the forfeiture of the franchise for furnishing electricity for heating and power, but was to negative any possible claim on the part of the grantee that the current which it was authorized to transmit could be disposed of by it for lighting purposes. In other words, the denial of the right of the grantee to transmit current for lighting purposes was intended to constitute a withholding of the franchise for that purpose.

“Conditions are not favored in law, and are construed strictly because they tend to destroy estates. 4 *Kent’s Comm.*, 130. *Crane v. Inhabitants of Hyde Park*, 135 Mass., 147. *McKelway v. Seymour*, 29 N. J. Law, 321, 327, *Waterson v. Ury*, 5 Ohio, Cir. Ct. R. 347. *In re Wellington*, 16 Pick., 87, 99. * * * And if it be doubtful whether a clause in a deed be a covenant or a condition, the court will incline against the latter construction. 4 *Kent Comm.*, 132. *Greene v. O’Connor*, 25 Atl., 692. *Adams v. Valentine*, *supra*.”

Los Angeles v. Swarth, 107 Fed. 798, 803.

C. C. A. 9th Cir.

To the same effect are:

Central Christian Church v. Lennon, 59 Wash., 425.

Carrol County Academy v. Trustees, 47 S. W., 617.

Star Brewery Co. v. Primus, 45 N. E., 145.

Dempwolf v. Graybill, 62 Atl., 645.

Wier v. Simmons, 13 N. W., 873.

Chapin v. School Dist., 35 N. H. 445.

Krueger v. R. R. Co., 185 Missouri, 227, 84 S. W. 898.

Frier v. Sanitarium Co., 115 N. Y. Supp., 734. Affirmed, 92 N. E., 1085.

Patterson v. Patterson, 122 S. W., 169.

Self v. Billings, 77 S. E., 562.

Seaboard Air Line Co. v. Anniston Mfg. Co., 65 So., 187.

Hawley v. Kafitz, 148 Cal., 393, 83 Pac., 248.

Avery v. U. S., 104 Fed., 711.

Union Stock Yards Co. v. Nashville Packing Co., 140 Fed., 701.

Ashland v. Greiner, 50 N. E., 99.

Zweig v. Sweedler, 125 N. Y. Supp., 171.

Forman v. Safe Deposit & Trust Co., 80 Atl., 298.

Brady v. Gregory, 97 N. E., 452.

Wright & Taylor v. Board of Education, 152 S. W., 543.

Perkins v. Kirby, 85 Atl., 648.

Farnham v. Thompson, 26 N. W., 9.

Church v. Bragaw, 56 S. E., 688.

Ecroyd v. Coggeshall, 41 Atl., 260.

Thornton v. City of Natchez, 41 So., 498.

Faith v. Bowles, 37 Atl., 711.

III.

THE FRANCHISE IS NOT SUBJECT TO FORFEITURE EXCEPT FOR FAILURE TO PERFORM AN AFFIRMATIVE ACT REQUIRED OF THE GRANTEE.

Hyde v. Warden, 3 L. R., Exchequer Div., (1877-8), 72.

West v. Dobb, 5 L. R., Queen's Bench (1869-70), p. 460.

Evans v. Davis, 10 L. R. Ch. Div. (1878-9), p. 747.

Doe v. Marchetti, 1 B. & A. D., 715, 109 Eng. Rep. full reprint, 953.

Doe v. Stevens, 3 B. & A. D., 29, 110 Eng. Rep. full reprint, 112.

In *Hyde v. Warden*, 3 L. R., Exchequer Div. (1877-8), pp. 72, 82, the court said:

“We should, if it were necessary, be prepared to hold that the contention of the plaintiff is correct that the power of re-entering, being only in the event of the lessee ‘wilfully failing or neglecting to perform any of the covenants,’ does not apply to a breach of a negative covenant. See *West v. Dobb*.”

In *West v. Dobb*, the Lord Chief Baron said (p. 464):

“The proviso is for re-entry ‘in case the lessee should fail in the observance or performance of the covenants on their part.’ It would seem only to refer to failure in the performance of affirmative covenants, whereas the covenant in question is a negative covenant, not to do a particular act, and it may be extremely doubtful, more particularly in a case of forfeiture, whether such a proviso would apply to a negative covenant.”

In *Evans v. Davis*, *supra*, the following language was used (p. 757):

“In almost every lease the proviso for re-entry is expressed to be in the event of the ‘non-performance or non-observance’ of any of the covenants. I have always understood that ‘non-observance’ refers to the negative covenants, and ‘non-performance’ to affirmative covenants.”

“The law will, when possible, so construe an instrument as to avoid forfeitures, and equity delights, when invoked, to relieve against them by giving compensation for failure to comply, rather than destroying the rights of the parties.”

Cuthbertson v. Morgan, 62 S. E., 744, 747.

“Forfeitures not being favored in the law, the provisions upon which they are based must be strictly construed.”

Town of Morris v. King, 28 N. Y. Supp., 281.

“It is a principle of universal application that forfeitures are abhorred in the law and will not be declared except in the clearest and most positive cases, or where the contract broken so provides in express terms. A forfeiture will be avoided, if possible.”

State of Wash. ex rel City of Tacoma v. Sunset Tel. & Tel. Co., 150 Pac., 427.

Appellee not having been damaged by the act of the Power Company in furnishing power to the Northern Pacific Railway from the 22nd day of May to the 2nd day of June, and having consented to a continuance of the furnishing of such power after the 2nd day of June, 1913, and having

adequate remedies to prevent the furnishing of such power for lighting purposes if it be unlawful for the Power Company to furnish power for lighting purposes, a court of equity will restrain the forfeiture of the franchise.

“The forfeiture clause in a deed must always be strictly construed against the grantor, and nothing will be held to cause a forfeiture unless it plainly appears to be such. 17 *Cyc.*, 89. 2 *Devlin, Deeds*, Sec. 793. In order to justify a forfeiture for the violation of the condition, the violation must be wilful and substantial, not merely technical. *Mells v. Evansville Seminary*, 58 Wis., 135. 15 N. W., 133. *Rose v. Hawley*, 141 N. Y., 366. 36 N. E., 335.”

Central Christian Church v. Lennon, 59 Wash., 425, 427.

Ill. Bank v. Doud, 105 Fed., 123, 129.

State ex rel Clapp v. Mfg. Co., 41 N. W., 1020, 1025.

High, extraordinary Legal Remedies, Sec. 649.

State ex rel Johnson v. Southern Building & Loan Assn., 31 So., 375.

Kansas City Ry. Co. v. Young, 152 S. W., 118.

State ex rel Dunbar v. Galena Water Co., 65 Pac., 257.

Commonwealth v. Turnpike Co., 97 S. W., 375.

“Where a duty or restriction is not expressed in terms and does not arise by clear and necessary implication, a violation thereof cannot be fairly regarded as a wilful and culpable breach of duty if done in good faith under claim of

right. The proper course in such cases is to test the right of the matter by other appropriate remedial action; and if the judgment of the court establishes the duty adversely to the service company, thereafter a wilful breach will be culpable in the sense now under discussion."

State v. Birmingham Water Works Co., 64 So., 23, 31.

"It will be seen that nothing remained in the contest but an interpretation of the provision of the contract relating to extensions. The claim was made by the city and denied by the company, that the city might at its option require the laying of additional mains over any of the unoccupied streets. Because of this dispute and refusal, the city asks an absolute annulment of the contract and a forfeiture of all the franchises and privileges under which the company is operating. * * * It appears that a bona fide dispute has arisen over the interpretation of a single provision, but should it be settled in a proceeding for an absolute forfeiture, and should the denial of the claim of the city in one particular be visited by the extreme penalty of civil death? * * * The law, however, does not look with favor on forfeitures, and it would appear that another remedy exists in which an interpretation of the contract may be obtained and complete redress awarded. * * *

In the section of the ordinance relating to forfeitures, the failure to make future extensions of the mains and pipes was not made a ground of forfeiture. * * *

A forfeiture is always abhorred, and according to repeated decisions of this court, it will ordinarily not be declared where there is another adequate remedy."

City of Topeka v. Topeka Water Co., 49 Pac., 79.

City of Olathe v. Ry. Co., 96 Pac., 42.

People v. North River Refining Co., 24 N. E., 834.

State ex rel Johnson v. Southern Building & Loan Assn., 31 So., 375.

Wheeling Electric Co. v. Town of Triadelphia, 52 S. E., 499, 512.

Joyce on Franchises, Sec. 491.

IV.

THE CITY HAVING BEEN FULLY COMPENSATED FOR ALL POWER FURNISHED TO THE NORTHERN PACIFIC RAILWAY AFTER JUNE 2, AND THE POWER COMPANY HAVING OFFERED TO PAY TO THE CITY THE VALUE OF THE POWER FURNISHED BETWEEN MAY 22 AND JUNE 2, 1913, IT WOULD BE ILLEGAL AS WELL AS INEQUITABLE TO ALLOW THE CITY TO INSIST ON THE FORFEITURE OF THE MORTGAGED PROPERTY.

“Where a man, through misapprehension or mistake of the law parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief if, under the general circumstances of the case it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired.”

Kerr on Fraud and Mistake, 4th Ed., 467.

South Carolina v. Gilbreath, 208 Fed., 899, 925.

“The general rule that one cannot obtain affirmative relief as against an otherwise well-founded claim on the bare ground of mistake of law, is relaxed where its enforcement will cause injustice, and when such relief can be given without injury to the rights of another.”

Reggio v. Warren, 93 N. E., 805.

- Bronson v. Leibold*, 87 Atl., 979.
Stoeckle v. Rosenheim, 87 Atl., 1006.
2 Pomery, Eq. Jur., 2nd Ed., par. 849.
Bottorf v. Lewis, 95 N. W., 262.
Mead v. Morse, 80 N. E., 513.
Noyes v. Anderson, 26 N. E., 316.
Kopper v. Dyer, 9 Atl., 4.
Dodsworth v. Dodsworth, 98 N. E., 279.
MacTier v. Osborne, 15 N. E., 641.
Hodges v. Buell, 95 N. W., 1078.
Grigg v. Lands, 21 N. J. Eq., 494.
Harley v. Sanitary Dist., 80 N. E., 771.
Ore. R. R. & Nav. Co. v. MacDonald, 112
 Pac., 413.

V.

(Specifications 5 and 6.)

THE CITY OF TACOMA HAD NO POWER, BY ITS CHARTER OR BY ORDINANCE, TO PREVENT THE LEGISLATIVE AUTHORITY OF THE CITY FROM GRANTING A FRANCHISE FOR THE SALE OF ELECTRIC POWER FOR LIGHTING PURPOSES.

The charter of the city, adopted in March, 1896, by the freeholders, contained the following provision:

“The legislative power of the city is forever prohibited from granting to any person or corporation whatever a franchise, privilege or right to sell or supply water or electric lights within the city of Tacoma to the city or any of its inhabitants, as long as the city owns a plant or plants for that purpose and is engaged in the public duty of supplying water or light, except that the city council may grant a franchise to supply water or electric light to any section or part of the city of Tacoma not supplied or fur-

nished by the city water or light plant, to cease and determine at such time as the city of Tacoma shall furnish and provide water and light in said section or part of the city." (p. 24.)

At the time this charter was adopted, the law of 1890, p. 131, authorizing cities to frame their own charters was in force, and subdivision 7, section 7507, Remington & Ballinger's Code, vested in cities of the first class the power—

“—to authorize or prohibit the use of electricity at, in or upon any of said streets or for other purposes, and to prescribe the terms and conditions upon which the same may be so used, and to regulate the use thereof.”

In 1903, the legislature enacted a law containing the following provision:

Section 1. “The legislative authority of the city or town having control of any public street * * * may grant authority for the construction, maintenance and operation of transmission lines for transmitting electric power, together with poles, wires and other appurtenances, upon, over, along and across any such public street * * *, and in granting such authority the legislative authority of such city or town * * * may prescribe the terms and conditions on which such transmission line and its appurtenances shall be constructed, maintained and operated upon, over, along and across such road or street.”

Laws of 1903, p. 360.

At the same session of the legislature, the laws of 1903, p. 364, the legislative authority of cities was authorized to grant—

“—authority for the construction, maintenance and operation of electric railroads or railways * * * over, along and across any public street * * * and in granting such authority the legislative authority of such city or town * * * may prescribe the terms and conditions upon which such electric railroad or railway * * * shall be constructed, maintained and operated.”

It will be observed that the only difference between the two statutes is that one applies to lines for transmitting electric power and the other applies to electric railroads and railways. In each case the power to grant the authority or franchise is vested by the legislature in the legislative authority of the city or town.

The question then arises whether the city charter of Tacoma, adopted in 1896, prohibiting the grant of a franchise for the transmission of electric power for lighting purposes in the city of Tacoma when the city could supply such power for such purpose, continued valid, or whether it was not repealed by the act of 1903 just mentioned. The Supreme Court of the State of Washington, in considering whether the city charter of Seattle, adopted in 1908, could impose restrictions upon the legislative authority in the grant of street railway franchises, under the laws of 1903, p. 364, held that the provisions of the city charter of Seattle requiring the legislative authority to insert certain provisions in such franchises were void because the state had vested the power to grant franchises in the legislative authority of the city and the city charter could

not restrain or impose conditions upon the exercise of the power so conferred.

“We think that, under the statutes of the state, the city council was without authority to submit to the voters for their ratification any ordinance granting a franchise for a street railway company, inasmuch as the power of granting franchises of this kind is vested directly and specifically by the legislature in the legislative authority of the city; that is, in the mayor and city council. For these reasons, the ordinance granting the franchise involved in this action was legal and valid, and it was not necessary nor proper that it should have been submitted to the voters, neither was it necessary to embody the restrictions and limitations provided for in said charter amendments adopted at the municipal election in March, 1908.”

Benton v. Seattle Electric Co., 50 Wash., 156, 163.

“It having become the settled law in this state, by the construction repeatedly placed upon the constitution, that a general law enacted by the legislature is superior to and supersedes all freehold charter provisions inconsistent therewith, it becomes plain that, when the legislature, by the laws of 1903 and 1907, gave to the legislative authority of the cities of the state the power to grant street railway franchises and also power to ‘prescribe the terms and conditions on which such railways * * * shall be constructed, maintained and operated,’ that power cannot be limited or prescribed by freehold charter provisions.”

Ewing v. Seattle, 55 Wash., 229, 240.

“We think there is no escape from the conclusion that the ordinance is in conflict with the

city charter. The question then arises, whether this provision of the city charter is valid. In *Benton v. Seattle Electric Co.*, 50 Wash., 156, 96 Pac. 1033, in considering this same charter provision, we held that it was void because in conflict with the laws of 1903, p. 364, as amended by the laws of 1907, p. 192 (Rem. & Ball. Code, 9080), which vests in the legislative authority of the city the power to grant franchises, and because the legislative authority of the city means the *mayor* and *city council*. In *Ewing v. Seattle*, 55 Wash., 229, 104 Pac. 259, we again held that the state law authorizing the mayor and the city council of cities to grant franchises to street railways is conclusive and controls charters of cities of the first class."

Dolan v. Pug. Sd. Traction, Lt. & Pow. Co.,
72 Wash., 343, 346.

These three decisions are based upon the law of 1903, p. 364, relating to street railways, the companion law of the law of 1903, p. 360, relating to power lines. There can, therefore, be no doubt that the decisions are just as applicable to the charter provisions of the city of Tacoma limiting the power of the legislative authority of the city in the grant of franchises for electric lighting, as they are to street railways in the city of Seattle, for the language of the grant of power as to each franchise is the same in both acts. There can, therefore, be no controversy over the proposition that the provision of the city charter of Tacoma prohibiting the grant of a franchise for electric lighting, is invalid. It does not follow, however, that if the legislative authority of the city of Tacoma, pursuant to the

legislative grant of power to grant franchises for electric lighting, exercised its discretion and refused to confer the privilege of doing a lighting business under a power franchise, the grantee of the power franchise would become the owner of an electric lighting franchise. Where, however, the legislative authority of the city granted the power company a franchise—

“For the purpose of transmitting, distributing and selling electric current to be furnished and used for the purpose of furnishing power and heat, or either of them, and the further right to charge for such current a reasonable compensation, and for any other use or uses to which electricity may be put except as hereinafter provided, provided that neither said Tacoma Railway & Power Company nor its successors or assigns shall have any right to supply electric current to be used directly or indirectly for lighting purposes,”

it did not in the exercise of its legislative discretion deny the franchise to the grantee, but it granted the franchise to the grantee coupled with the illegal provision contained in the city charter and incorporated in the proviso, which it believed it had no power to dispense with. The proviso therefore was not legally incorporated in the franchise as the act of the legislative authority of the city. The proviso was the act of the freeholders who framed the city charter. The portions of the franchise other than the proviso were the results of the exercise of discretion by the legislative authority of the city. The proviso was no act of the legislative authority, and therefore in law is not to be read into the franchise.

“If the city had attempted to grant such privileges (a franchise) to a telephone company, so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power. The city cannot by ordinance or contract disable itself to consent to the erection of telephone lines upon its streets. *The volition to consent or refuse is one of the powers vested by the legislature in cities of the first class, and this continuing power cannot be divested without the sanction of the legislature.*”

State ex rel Telegraph Co. v. Spokane, 24 Wash., 53, 59.

North Springs Water Co. v. Tacoma, 21 Wash., 517, 529.

“The principle is fundamental and of universal application that public powers conferred upon a municipal corporation and its officers and agents cannot be surrendered or delegated to others.”

McQuillan on Municipal Ordinances, p. 128.

“A municipal corporation *cannot divest itself* of its governmental functions conferred by the legislature by a surrender, or impair its right to exercise such functions as may be necessary and proper for the public good.”

20 *A. & E. Cyc. of Law*, 2nd Ed., 1142.

4 *Supp. A. & E. Encyc. of Law*, p. 95, note 8.

Mayor v. Flack, 64 Atl., 702, 709.

Vandalia R. R. Co. v. State, 76 N. E., 980, 984.

Atty. Gen. v. Lowell, 38 Atl., 270, 271.

“A legislative power granted to a municipal corporation cannot be parted with unless such

was the clear intent of the legislature, for *it never will be presumed that the legislature, having granted the power, has at the same time authorized a surrender of it.* The authority to surrender the power must appear from the *'clear letter of the law.'*”

National Water Works Co. v. City of Kansas,
20 Missouri Appeals, 237, 242.

In a case where the court denied the right of the board of trustees of the city of Alameda to suspend a power conferred upon it by the legislature until an election could be held to ascertain the wishes of the voters in reference to granting a franchise, the court said:

“But we deem it immaterial whether the longer or the shorter period be taken. In either case it is obvious that it was *beyond the powers of the board* by ordinance or otherwise to divest itself and succeeding boards, for a longer or shorter period, of powers vested in it by the general law for the benefit of its constituents; *for this would be to repeal pro tanto the general law.*”

Thompson v. Board of Trustees, 77 Pac., 951.

Inasmuch, therefore, as after the enactment of the law of 1903 vesting in the legislative authority of cities the power to grant franchises for power lines, the city of Tacoma could not have incorporated into its city charter a provision prohibiting the legislative authority of the city from exercising such power, it necessarily follows that the previous prohibition upon the exercise of such power con-

tained in the charter of 1896 became invalid upon the enactment of the law of 1903.

The franchise of the Power Company, involved in the present case, was granted in February, 1905, after the enactment of the law of 1903, which law is still in force.

The franchise, therefore, we submit, should be read as containing all of the provisions except the proviso, and the proviso should be eliminated because it was not a condition inserted by the legislative authority of the city and was void.

Murphy v. Worcester Consolidated St. Ry.,
85 N. E., 507, 509.

In re Kings County Elevated Ry., 13 N. E.,
18.

Galveston & W. Ry. Co. v. City of Galveston,
39 S. W., 96.

Galveston & W. Ry. Co. v. Galveston, 155 S.
W., 273, 282.

State ex rel Grinsfelder v. Spokane St. Ry.,
19 Wash., 518.

Crawford v. O'Shea, 75 Wash. 33, 44.

Illinois St. Board v. People, 13 N. E. 201.

That the legislative authority of the city did not exercise its discretion as to the proviso because it denied the authority vested in it by the legislature to exercise such discretion and felt bound by the charter provision, plainly appears from the language of the resolution revoking the permit to supply electric current. (Answer, Exhibit C.)

THE CITY OF TACOMA COULD NOT LEGALLY INSERT IN A FRANCHISE A PROVISION THAT AS TO A CERTAIN CLASS OF BUSINESS, THE CITY SHOULD HAVE A MONOPOLY.

The legislative authority of the city in granting this franchise was exercising a power delegated by the legislature. It could not grant a franchise which would creat a monopoly. It follows, therefore, that it could not insert a reservation which would create a monopoly in favor of the city. The city had no power to accept such a monopoly, except from the state, and the state had conferred upon the city no authority to create or accept a monopoly. Section 8005 of Rem. & Ball. Codes & Statutes, while authorizing cities to construct and acquire public utilities, contains not the slightest intimation of the power to create a monopoly in favor of such utilities. There being no grant of power to create a monopoly, the city was without such power. It could not reserve a power it had not been granted.

“That grants to municipal corporations, like grants to private corporations, are subject to the rule of strict construction was announced by this court in *Citizens’ Street Railway v. Detroit Ry.*, 171 U. S.. 48, following and applying the doctrine of previous cases. It was said that the power to grant an exclusive privilege must be expressly given, or if inferred from other powers, must be indispensable to them, and that this principle was firmly fixed by authority.”

Water, Light & Gas Co. v. Hutchinson, 207 U. S., 385, 393.

Citizens’ Street Ry. v. Detroit, 171 U. S., 48.

Joyce on Monopolies, Secs. 277, 280.

State ex rel Armstrong v. Waseta, 142 N. W., 319.

City of Montgomery v. Greene, 60 So., 900.

Wagner v. Rock Island, 34 N. E., 545.

Brunns Appeal, 12 Atl., 855.

Wigal v. City of Parkersburg, 81 S. E., 554.

In *Springfield City v. Springfield Gas Co.*, 31 Ohio Circuit Court Reports, 446, affirmed in 91 N. E. 1139, the court said:

“Under the rule that one has the right to make such use of his property as one may choose, such use not being unlawful nor injurious to the person or property of others, the purchaser of natural gas, after the commodity became his property, may use it for lighting his premises upon a compliance with the company’s method for its deliverance.

A municipality has not the authority to prescribe by ordinance that its inhabitants shall not use property acquired for any purpose, neither dangerous nor injurious.

This court held, in the case of *State v. Traction Co.*, 10 Cir. Dec. 212 (18 Re. 490) that where a city grants permission to a street railway company to construct its road in its streets, *it may not do so upon the condition that the company does not exercise one of its corporate powers*, and therefore a condition or regulation that the company shall not carry freight is void. This judgment was afterwards affirmed by the Supreme Court, *State v. Traction Co.*, 64 Ohio, St. 272 (N. E. Vol. 60, page 291).

If a city ordinance containing such regulation is void for the want of power to exact such a condition, it follows, we think, that an ordinance limiting the use of a commodity, such as nat-

ural gas, conceded to be safe and available for illuminating purposes, to that of fuel, heat and power, is void also for the same reason. If the city cannot in the one case, for the lack of power, require the corporation to contract away the right to exercise one of its corporate powers, it would certainly be without power in the other case to deprive the city and its inhabitants, by ordinance, of a common right."

In *People ex rel City of Los Angeles v. Los Angeles Independent Gas Co.*, 89 Pac. (Cal.) 109, the court said:

"The gas is delivered to the consumer at certain meters on their premises, and after it passes beyond the meters it is the property of the consumer, and defendant has no further control over it. Some of these consumers use the gas, not only for illuminating purposes, but also for heating and cooking, and a few—not more than one in fifty—use it for heating purposes exclusively. It may be assumed that defendant knew that some of the gas furnished by it was used for heating, as well as illumination. And the contention of appellant is that the franchise of having pipes in the streets has been forfeited because the gas furnished by it has not been used for illumination alone, but has been used also for other purposes above mentioned. This contention is, in our opinion, not maintainable. Indeed this court has determined the matter adversely to appellant's contention by its decision in *re Johnson*, 137 Cal. 115, 69 Pac. 973, and in *Denninger v. Records' Court*, 145 Cal. 629, 638; 79 Pac. 360."

It is to be borne in mind that a municipal corporation, in lighting its streets, may be exercising a governmental power, but when a municipal corporation goes into the private business of furnishing

light to its inhabitants for profit, then it is governed by the same rules which apply to other corporations and to individuals.

In *South Carolina v. U. S.*, 199 U. S. 437, 463, the Supreme Court quoted with approval from *Western Savings Fund Society v. Philadelphia*, 31 Pa., St. 175, the following language:

“The supply of gas light is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough, or a city, it is a *special private franchise*, made as well for the private emolument and advantage of the city as for the public good. * * * If the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, *the corporation quoad hoc is to be regarded as a private company*. It stands on the same footing as with any individual or *body of persons* upon whom the like *special franchises* had been conferred.”

The city of Tacoma had, therefore, no power to insert in the franchise a provision creating for itself in its private capacity a monopoly in the lighting business. It is to be borne in mind that in this case the ground of complaint against the Power Company was not that the Power Company was doing anything upon the streets of the city which should not be done, but that the Power Company, doing upon the streets of the city what the city had granted the Power Company a franchise to do, should forfeit its franchise because the purchaser of the

power, on its own premises, converted the power into light, and the city claimed that it was entitled to a monopoly of the lighting business, not only upon the streets of the city, but in the private residences of its citizens.

VI.

(Specification 10.)

THE CITY HAD UNDER NO CONDITIONS THE RIGHT TO FORFEIT TO ITS OWN USE THE PHYSICAL PROPERTY OF THE POWER COMPANY SUBJECT TO APPELLANT'S LIEN WITHOUT THE JUDGMENT OF A COURT IN A PROCEEDING TO WHICH APPELLANT WAS A PARTY.

Baldwin v. Smith, 82 Ill., 162.

People v. Ry. Co., 27 Pac., 673.

Nebraska Telephone Co. v. City of Fremont,
99 N. W., 811.

Foster v. City of Joliet, 27 Fed. R. 899.

Southern Bell Co. v. City of Mobile, 162 Fed.
R. 523.

Iron Mountain R. Co. v. Memphis, 96 Fed. R.
123.

The language in the case of *Wheeling R. R. Co. v. Triadelphia*, 52 S. E., 499, 510, cited above, is quite pertinent to this case:

“While the town has the right to require full and complete performance of all covenants on the part of the railway company, and is not bound to accept a mere substantial performance, its authorities, in proceeding to take away the rights of the company pursuant to the terms of the ordinance, must deal frankly and fairly with it. They must act in good faith and not endeavor to pervert this forfeiture clause to a purpose for which it was never intended. Neith-

er party ever supposed it would be used for any purpose except to compel performance of the covenants entered into by the railway company. * * *

In *Wakefield v. Village of Theresa*, 109 N. Y. Supp., 414, 417, the court said:

“The real animus of the attempt to remove the plaintiff’s plant apparently is to get rid of a competitor to the new municipal lighting system.”

It seems in the case at bar, that there is a similar animus; but appellee must remember that in this case the attempt is not simply to take the property of the Power Company, it is an attempt to take trust property away from the trustee who holds it for innocent bondholders who had no notice of any of the proceedings, who was not a party to the litigation, and who has come into a court of equity asking that its *cestuis que trustent* should not be spoiled.

We submit that whether the case be viewed from the standpoint of the common law, or be dealt with in accordance with the rules of equity and fair dealing, the decree appealed from should be reversed and the prayer of appellant’s bill granted.

Respectfully submitted,

JAMES B. HOWE,

JOHN A. SHACKLEFORD,

Counsel for Appellant.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY,
as Trustee, *Appellant*,

VS.

THE CITY OF TACOMA, *Appellee*.

No. 2601

APPELLEE'S BRIEF

APPEALED FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTH-
ERN DIVISION, CUSHMAN, D. J.

T. L. STILES,
City Attorney;

FRANK M. CARNAHAN,
Assistant City Attorney;
Attorneys for Appellee.

Tacoma, Washington.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY,
as Trustee, *Appellant*,

VS.

THE CITY OF TACOMA, *Appellee*.

No. 2601

APPELLEE'S BRIEF

APPEALED FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTH-
ERN DIVISION, CUSHMAN, D. J.

INDEX.

Charter — Ordinance — Resolution.

	Page.
Tacoma Charter, Sec. 233	4
“ Ordinance 2295, Sec. 1	5
“ “ “ “ 11	7
“ “ “ “ 17	7
“ Resolution 6118	8
“ “ 6131	8

AUTHORITIES.

Beall v. White, 94 U. S. 382	20-21
Brainerd v. Peck, 34 Vt. 496	20
Calder v. Michigan, 218 U. S. 591	23
“CYC” Vol. 6, p. 1022-1041	19
“CYC” Vol. 27, p. 1141, note 9	20
Dunsmuir v. Port Angeles Gas Co., 24 Wash. 104	19
Guaranty Trust Co. v. Atlantic & R. Co., 132 Fed. 68	20
Jones, Corp. Bonds & Morts. Secs. 91-104-114	20-22
Louisville Trust Co. v. Cincinnati, 76 Fed. 296	9
Maxwell v. Wilmington etc. Co., 77 Fed. 938	20
Nat. Bk. of Com. v. Locke, 17 Wash. 528...	20
Old Colony Trust Co. v. Omaha, 230 U. S. 100	23
Palestine W. & P. Co., v. Palestine, 40 L. R. A, 203	24
Smith v. McCullough, 104 U. S. 25	21
Southern Bell Tel. Co. v. Richmond, 103 Fed. 31	13
Tacoma Ry. & P. Co. v. Tacoma, 79 Wash 508	9

About 1899 The Tacoma Railway & Power Company, (which we will call the "Railway Company") then operating a street railway system in the City of Tacoma, mortgaged its property to the Old Colony Trust Company, as Trustee, to secure bonds in the sum of \$1,300,000. which bear interest at 5 per cent. The property of the mortgagor company is of the value of six or seven millions, and its income in 1914 was \$1,060,210.74.

In 1905 the Railway Company procured the passage of Ordinance 2295 by the Council of the City of Tacoma which conferred upon it the right to maintain poles and wires in the streets over which to convey and sell electric current for heating and power purposes. Appellant is contending that, under the terms of its mortgage, the rights acquired by its mortgagee through the ordinance inured to it as a further security. The Railway Company did not manufacture electric current, but bought it at a cost of about .575 of one cent per kilowatt hour. In connection with this business it employed about three thousand dollars worth of poles and wires, and sold \$25,000 to \$50,000 worth of current per annum at an expense of about \$18,000.

The operating expenses and taxes of the Railway Company for 1914 were \$843,706.17, which left \$216,504.57 with which to pay the \$65,000 due appellant as interest on its mortgage debt, which is a first lien.

The foregoing facts are set forth from the record in order that the Court may see just how trivial this proceeding is, since appellant has nearly five times the face of its debt as security for its principal, and more than three times its interest in net income of its debtor. These facts and others which abundantly appear show clearly that this appellant is merely lending its name and technical claim of lien to assist the principal defaulter in escaping the consequences of its own delinquency after the whole matter has been adjudicated in the courts of Washington at its own suit.

*TACOMA RAILWAY & POWER CO. v. CITY
OF TACOMA.*

The Charter of the City of Tacoma, as amended in 1896, contained the following, which was continued as Section 233 of the Charter of 1909, viz:

“The legislative power of the city is forever prohibited from granting to any person or corporation whatever, a franchise, privilege, or right to sell or supply water or electric lights within the City of Tacoma, to the city or any of its inhabitants, as long as the city owns a plant or plants for that purpose, and is engaged in the public duty of supplying water or light; except that the City Council may grant a franchise to supply water or electric light to any section or part of the city of Tacoma, not supplied or furnished by the city water or light plant, to cease and determine at such time as the city of Tacoma shall furnish and provided water and light in said section or part of the city.”

Tacoma had had its own municipal light plant since 1893.

Therefore, when in 1905 the Railway Company sought a franchise to enable it to distribute and sell electric current the purpose of the grant was limited thus:

Section1. That there be and is hereby granted to the Tacoma Railway and Power Company, a corporation, organized and existing under and by virtue of the laws of the State of New Jersey, its successors and assigns, for a period of twenty-five (25) years, the right, privilege, authority and franchise to erect and maintain pole lines and underground conduits and to stretch wires thereon and therein, over, along, across, and also underneath the streets and alleys of the City of Tacoma in the manner hereinafter provided, for the purpose of transmitting, distributing, and selling electric current to be furnished and used for the purpose of furnishing power and heat, or either of them, and the further right to charge for such current a reasonable compensation, and for any other use or uses to which electricity maybe put, except as hereinafter provided; *Provided, that neither said Tacoma Railway and Power Company, nor its successors or assigns, shall have any right to supply electric current to be used directly or indirectly for lighting purposes, or to run motors, dynamos, or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association, or corporation, except, where the grantee herein, its successors and assigns, may furnish current for street railway purposes, then and in that event current may be sold for lighting street cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway & Power Company, its successors and assigns,*

the right to sell power for power and heating purposes and for lighting street cars; but in no event except as hereinafter provided, shall the said grantee, its successors and assigns, furnish power to be used for lighting or generating electricity for lighting; PROVIDED, FURTHER, however, that nothing in this section contained shall prevent the said city from granting the said Tacoma Railway & Power Company, its successors or assigns, by special permit, the right to furnish any person, firm, or corporation, within said city, or said city, electric current for lighting purposes, subject to the provisions of the City Charter and the laws of the State of Washington; such permit, however, to be revocable at any time at the option of the City.

The reason for such a restriction was obvious. The City's lighting plant, necessarily constructed with overhead poles and wires, covered every part of its street system, and to authorize another concern to enter the same line of business would inevitably lead to more lines of poles and wires. Besides which, the City had a perfect right to maintain for itself a monopoly of the lighting business. Its Charter, Amendment 14, quoted above, enjoined protection of that right. On the other hand the power and heat business would naturally be confined to the business sections of the City, and the City was not then furnishing current for such purposes.

The ordinance, perhaps unnecessarily, contained a declaration that the City might grant to the Company special permits to furnish current for lighting purposes, which permits should be revocable at any time, at the option of the City.

These provisions about furnishing current for lighting were conditions subsequent upon which the right to exercise the franchise at all always depended and by accepting the franchise the grantee expressly undertook to perform them; to insure their performance Sections 11 and 17 were enacted.

Section 11 (Trans. p. 25) declared that without the passage of any resolution or ordinance the rights granted should be null and void and absolutely of no effect "upon the failure of the grantee * * * to perform any and all of the conditions in this ordinance specified" for a period of thirty days after notice served upon it to the effect that if it did not correct the failure within that time its franchise would be considered null and void. And in that event, unless it removed its poles and wires within sixty days, they should be forfeited to the City.

Under Section 11 the forfeiture is automatic, and depends only on whether the facts justifying it exist. But in Section 17 (Trans. p. 27) the right was further reserved to the City to repeal the ordinance and terminate all rights by that method "if the franchise granted hereby is not operated in accordance with the provisions of this ordinance."

Now at sometime prior to April 1913, permission had been given the Railway Company to furnish sundry consumers electric current for lighting as well as other purposes, which per-

mission was revocable at any time, as stipulated in the ordinance. But by that time the City had acquired an ample electric generating plant sufficient to cover the entire lighting business within its boundaries, and it therefore exercised its right to recall all the lighting permits outstanding.

This action was taken in a polite manner, April 2nd, 1913, by the adoption of Resolution 6118 (Trans. p. 7), and it was resolved "that said Tacoma Railway and Power Company, from and after the 15th day of April, 1913, cease to furnish or supply any person or corporation in the City of Tacoma any electric current for lighting purposes."

The City Clerk was directed to deliver a copy of the resolution to appellant, and he did so forthwith.

But the Railway Company ignored the notice and continued furnishing lighting current as before.

Then on April 21st, the Council adopted Resolution 6131 (Trans. p. 9) in accordance with the provisions of Section 11 and 17, warning the Company of its violation of the condition regarding the furnishing of current for lighting purposes, and caused the Commissioner of Public Works to give further notice that unless it ceased its violation of the ordinance within thirty days after service of the notice, the franchise granted by the ordinance would be held null and void; that the poles and wires would be forfeited if not re-

moved within sixty days thereafter; and that the Council would repeal the ordinance.

The notice was given April 22nd, but the Company went right on ignoring the whole matter until the last day of the 30-day period, when it commenced an action in the Superior Court to enjoin the City from forfeiting the franchise. The answer contained a cross-complaint demanding that the franchise be decreed forfeited. After trial on the merits judgment was entered as prayed for in the answer, and the case was appealed to the Supreme Court of the State, where it was affirmed. The report of the case is in 79 Wash. p. 508, and for the purpose of more clearly showing the issues before that Court, a certified copy of the record of the Superior Court was made Defendant's Exhibit C, of the record here.

This is the case referred to by Judge Cushman in his opinion, (Trans. p. 35).

So much has been stated, not for the purpose of claiming *res judicata*, but to sustain the Court below in its findings on points wherein the federal courts follow the state courts. We simply invoke the rule clearly stated by Justice Linton in *Louisville Trust Co. v. Cincinnati*, 76 Fed. 296-301.

These points are printed at p. 45 of the Transcript, as follows:

1. Was the condition in the ordinance that the appellant should not furnish electricity for lighting purposes a valid one; that is, did

the city have the power to so limit the franchise?"

The answer of the Supreme Court to this query was:

"In respect to the first question, there seems little room for a difference of opinion. The statute quoted, Rem. & Bal. Code, Sec. 7507, subd. 7 (P. C. 77 Sec. 83), expressly empowers cities of the first class to regulate and control the use of streets, and to "authorize or prohibit" the use of electricity at, in, or upon any of the streets, "and to prescribe the terms and conditions upon which the same may be used, and to regulate the use thereof." Broader language could hardly be used. It is obvious that the legislature intended to, and did, vest the city with the whole of the state's police power touching the subject-matter. State ex rel. *Spokane & British Columbia Telephone & Telegraph Co. v. Spokane*, 24 Wash. 53, 63 Pac. 1116; *Western Union Tel. Co. v. Richmond*, 224 U. S. 160; *Coverdale v. Edwards*, 155 Ind. 374, 58 N. E. 495. In the Coverdale case, in considering a similar question, the court said: "The unqualified right to grant or refuse at discretion carries with it the right to impose any terms on the grant not forbidden by law."

"Authority from the legislature to regulate and control the use of the streets, to vacate them, to authorize or prohibit the use of electricity upon the streets, and to prescribe the terms and conditions upon which the same may be used, and to regulate the use thereof, is so broad in its nature that it is clear the legislature intended to empower cities of the first class to hedge any such privileges with all the conditions that the state itself could impose. The charter adopted by the people in pursuance of this authority shows that the people intended to reserve to themselves the exclusive right

to furnish light to the city and its inhabitants, to the extent of the ability of the city, and no statute has been cited which limits or qualifies the right of the people of cities of the first class to do so."

(79 Wash. 514-15.)

2. If so, was the limitation abrogated by the public service commission law (Laws 1911, p. 543?)

This question was thus disposed of by the Supreme Court:

"In respect to the public service commission law, and sections 8, 30 and 33 (3 Rem. & Bal. Code, Secs. 8626-8, 8626-30, 8626-33), which are relied upon by the appellant, it seems sufficient to say that that law deals only with the questions of safety, efficiency, rates, and equality of public service. The power to grant a limited franchise is still in the city. No power was given to the public service commission to grant, modify, or abrogate franchises or contracts arising out of franchises except in regard to rates and the regulation of service in respect to its safety, efficiency, and equality. It was not the purpose of the act to enlarge franchises, or to require the performance of acts being exercised under a franchise which could not be legally exercised, or for a longer period than such acts could be legally exercised. The appellant has cited *State ex rel. Webster v. Superior Court*, 67 Wash. 37, 120 Pac. 861, Ann. Cas. 1913 D. 78; *Seattle Elec. Co. v. Seattle*, 206 Fed. 955, and *Worcester v. Worcester Consol. S. R. Co.*, 196 U. S. 539. In the Webster case, it was held that the right to fix the rates of telephone companies was vested in the public service commission. In *Seattle Elec. Co. v. Seattle*, Judge Rudkin held that the public service commission law withdrew from cities the power to fix rates for street car service. In the Worcester case, it was held that the state had

the power to abrogate the limitations and conditions contained in a franchise. None of these cases are apposite to the question before us."

(79 Wash. 515-16.)

The third point considered by the Supreme Court was:

"Did the refusal of the appellant to discontinue furnishing power to the Northern Pacific Railway Company for lighting purposes warrant the Court in adjudging a forfeiture?"

The answer was emphatically in the affirmative, the Court saying:

"The authority to declare the forfeiture is so clearly expressed as to remove the question from the sphere of debate."

Judge Cushman (Trans. p. 46) yielded adherence to the same view, thus:

"In view of the reasoning of the State Court and the analysis made by it of the decisions on this question, its ruling is approved and followed."

For the details of that reasoning we shall beg to refer to the opinion; but we wish to emphasize one matter.

Appellant in the case below, as it probably will here, endeavored to confuse the record by imputing some fault to the City because it was not "ready" to take over the Northern Pacific business when it passed the two resolutions, and because the Northern Pacific's system at South Tacoma was a combined one of both light and power, which it would have cost something to separate into parts.

But the Railway Company, officered by astute men and advised by competent counsel, was bound to know that under any permits which might be granted the combination of power and light service was liable to become embarrassing at any time, and they knew, too, that the Company could not, with any certainty whatever, make a contract with any of its patrons for a ten-year combined service. The City had been operating its light plant since 1893 and its intended construction of a large generating system was perfectly well known; also, that it would demand cessation of appellant's lighting operations upon completion of the new system was perfectly certain and apparent.

Accepting Judge Cushman's kindly view that it did not appear that there was hostile defiance on the part of the Railway Company's officers of the resolutions, it remains that for a month and a half there was persistence in refusal to cease the lighting business; and the Company developed, both in the pleadings in the case made and in the arguments in both Superior and Supreme Courts, which are continued here, that the refusal was based, first, on a claim that the engagement which the Company had entered into was not binding upon it, and, secondly, that a subsequent law had, unsuspectedly, relieved it of that obligation—both unconscionable positions for it to take, for as was said in *Southern Bell Tel. & Tel. Co. v. Richmond*, 103 Fed. 31, where like contentions were made against the power of the city to enact and enforce conditions:

“It may safely be assumed that, without such qualifications and conditions, consent would not have been given; that they were the reasons and motive cause for the consent. Then, if the city council could not have given—had no authority to give—a conditional or qualified consent, its attempt to consent was unauthorized, *ultra vires*, and void, and in fact it never had consented in the only way in which complainants maintain it could consent. From this point of view, the condition precedent of the act of the general assembly has not been performed. In order to maintain and operate its lines in Richmond, the telephone company is without the consent of the council, and must obtain it.”

In that case the ordinance was repealed within two years after its passage, but there was no hardship in it because by its own terms the right to repeal was reserved. The Court of Appeals of the Sixth Circuit merely gave effect to the agreement of the parties, and of that no one can complain.

There never was any fair question of the City's taking over the entire Northern Pacific power load. It had no desire to do so and no expectation of any such thing. It had no thought but that the Railway Company, upon its being notified of the withdrawal of its permits, would accept the situation in compliance with its franchise. If the Company had involved itself in a contract with the Northern Pacific which it could not carry out, and induced it to construct machinery which was not suitable, it was for the inducing party to untangle the situation. But instead of yielding adherence to its pledges within such necessary additional time for adjustment of its relations to its patrons as would have

been readily granted by the City, it at first treated the action of the Council with indifference, and then with what amounted to defiance, since its opposition was based on matters about which the Supreme Court said there was "no room for difference of opinion" and which were beyond "the sphere of debate." It sought to force a waiver of the demands of the resolutions by urging that the Northern Pacific Company would be discommoded and perhaps suffer delay in its shop work if the light and power business were segregated. It feinted to turn over to the City the entire light and power business at the South Tacoma shops, when it knew that although the City could take over the lighting business, which was all it was demanding, at any time on short notice, it could not take the power business, which it fully expected the Railway Company to retain, for several months. This tender of the entire business was mere bluff for the purpose of frightening city officials at the idea of disturbing, and maybe temporarily stopping, a great industry. For more than forty days after the permits were recalled, and for all but one of the thirty days allowed by the second resolution, nothing whatever was done by the Railway Company to put itself on the safe side in case its contentions should prove groundless. It did not even ask the Council for an extension of time, or for an agreed case, or anything which might have postponed the effect of the second resolution. On the contrary, when it did act it did so with bludgeon and battle axe.

Its complaint attempted to avoid its obligation not to sell power for lighting purposes by alleging that it had contracted to sell power to the Northern Pacific Railway Company in bulk and claiming that it could not be held responsible if its vendee used some current for lighting, (Complaint, Exhibit C, Par. VII) though the contract it had made, when produced, showed that it had expressly bound the Northern Pacific to purchase all its current for both power and lighting from the Railway Company for ten years. Its reply, however, developed that it was not only claiming entire absolution from the conditions of its franchise but, also, that the Public Service Act had made it unnecessary that it have any franchise at all, or, in short, that being on the ground it, in effect, had a universal and perpetual franchise for every electrical purpose without any resort to the City for authority to use the streets.

In the presence of such an attitude on the part of its gratuitous beneficiary the City could, in self respect, do no less than assert its right to terminate the whole arrangement, or thenceforth know that it had no control whatever over its streets so far as the Tacoma Railway & Power Company was concerned.

THE SUGGESTED WAIVER.

The City of Tacoma is a municipal corporation whose legislative body consists of a Mayor and four councilmen. The franchise under consideration was granted by ordinance, so that no city officer had any authority to vary its terms or waive any

of its conditions. The resolutions were adopted by the Council and were of the same legal effect as if they had been ordinances; and both of them, couched in words identical with the franchise ordinance and referring to it, expressed clearly the purpose intended.

Yet, emissaries of the Railway Company, without going openly to the Council and there having out to a settlement such matters as the Company saw fit to present, commenced a sort of seige of the Commissioner of Light and Water to get him to agree to something which would have been contrary to the resolutions of the Council, but which might have been claimed as a waiver or estoppel as against the City. He was asked if certain things would not be "all right" and was urged to sign a certain paper which would have made it appear as though he were requesting the Railway Company to go on with its Northern Pacific transaction just as before. He fled to the City Attorney for relief, and was told not to sign the paper at all. Interviews were had with the Attorney at which it was "supposed" that the City would bring a suit and other suggestions were made and talk had, upon which it is now contended that the innocent lambs were led to believe that the Council and all were merely laying a foundation for a lawsuit and by no means meant what was said in the resolutions.

No support for any such self-delusion appears in the evidence of what took place at any of these interviews; but the Court below allowed appellant to put

in evidence several letters between its own agents which were never seen by any one representing the City, and in which one agent assured the other of his construction of what was happening. Of course these letters were inadmissible for any purpose except as they showed how this great street railway corporation entrusted affairs of so great importance to one who appears to have had no conception of the manner in which they should be handled.

In spite of assurance that no suit would be brought except by the Railway Company itself, nothing was done except service of a complaint on the last day allowed by the second resolution. No order was asked for or made stopping the running of the time, and on the next day the forfeiture became absolute.

The case was heard and determined in thirteen days after it was commenced; and the same diligence would have furnished the decision at any time after May 5th, leaving at least fifteen days in which the Company could have easily adjusted itself to the situation. But it chose to go on in its own way, using up all the time, and neither asking nor proposing to give quarter.

In the last analysis of the matter, however, it stands out pretty clear that appellant never placed any reliance upon the propositions it put forth, but merely sought by the assertion of broad claims, to delay the time when it would have to either give up its profitable Northern Pacific contract entirely

or be at the expense of about \$1,500 for the reconstruction of the service wires at the South Tacoma shops. In aid of the policy of delay was the effort to procure from city officials with no authority whatever in the premises, letters, or at least expressions, which would serve in the future to found a claim of waiver upon—something to aid in an argument over the sacredness of franchises and vested rights and the abhorred forfeiture.

APPELLANT.

We submit that appellant had no interest in this franchise.

As against third persons a chattel mortgage must describe the subject matter and locate it so that it may be identified.

6 Cyc. p. 1022, et seq.

At common law a chattel mortgage upon property subsequently acquired is void except as between the parties.

6 Cyc. p. 1041, "Future Interests."

In Washington, property of the character of that in controversy is personal property.

Dunsmuir v. Port Angeles Gas Co., 24 Wash. 104.

The right to mortgage after acquired personal property is peculiar to railroads and does not extend beyond such property as is actually employed in the operation of the railroad.

National Bank of Commerce v. Lock, 17
Wash. 528.

(Where the description was "all the property, real, personal and mixed, now owned or to be hereafter acquired by the Rainier Avenue Electric Railway Company.")

See Jones on Corporate Bonds and Mortgages, Chapter IV, Secs. 91 et seq., and particularly Sec. 104 and notes.

Brainerd v. Peck, 34 Vt. 496.

Guaranty Trust Co. v. Atlantic, etc., R. Co., 132 Fed. 68.

(See last paragraph of opinion, p. 75.)

Description: "All the certain railroad and other property, real and personal and franchises of said railroad Company, whether now owned or hereafter acquired by it."

Courts of equity will, in certain cases, give effect to a mortgage of property to be acquired subsequently, where no rule of law is infringed and the rights of third persons are not prejudiced.

Beall v. White, 94 U. S. 382.

But no lien will attach to after acquired property unless it is mentioned in the mortgage or referred to in terms clearly showing an intention to bind it.

27 Cyc. p. 1141, and note 9;

Maxwell v. Wilmington, etc., Co., 77 Fed. 938.

Language very similar to that above quoted from plaintiff's mortgage was construed by the Supreme Court of the United States in *Smith v. McCullough*, 104 U. S. 25. There a specific description of railroad property *followed* the words: "All the present and in the future to be acquired property of etc.," and the Court on page 28 said:

"The subsequent phrase "that is to say," followed by a detailed description of the different kinds of property which are embraced by the general words quoted, indicates that the mortgage was not intended to embrace every conceivable possession and right belonging to the railway company, but only the road and its adjuncts and appurtenances."

In this case the detailed description *preceded* the clause which referred to after acquired property "growing out of and appertaining to said property" that is being appurtenant to the street railway property mortgaged.

As to the doctrine of equity in case of the mortgage of after acquired property, see

Beall v. White, 94 U. S. 38-5-7;

Smith v. McCullough, 104 U. S. 25.

Here the Court said: "We will consider whether the bonds issued by Sullivan County are enhanced, or were intended to be enhanced, by the mortgage to the Farmer's Loan & Trust Company. That question is within a very narrow compass. It must be solved so as to give effect to the intention of the parties, to be collected as well from the words of the instrument as from the circumstances attending its execution, etc."

The circumstances here appear in the mortgage itself. It was an instrument made upon organization and consolidation of various street railways into one system. It was street railway property alone that was mortgaged. The property now before the Court had no existence, is not shown to have been contemplated or thought of, and even the ordinance creating the franchise did not come into existence for more than six years afterward. There is no pretense that it was in any way an appurtenance of the street railway.

But the learned District Judge, although recognizing the force of the authorities cited, deemed it sufficient that the parties to the mortgage had treated the franchise for power and heat as though it were covered by the instrument. (Transcript p. 38.)

We submit that such recognition had no effect to estop a third person from maintaining the contrary, and that the City of Tacoma was free to do so.

However, His Honor gave no damaging effect to his ruling on this point, since he further held that the mortgagee was bound by all of the conditions under which its mortgagor acquired the mortgaged property, citing

Jones, Corp. Bonds and Morts., Sec. 114:

That is, if the appellant did acquire a lien upon this franchise and property, it was entirely subordinate to the City's right to purchase at a reasonable price, to forfeit the franchise, and to take the prop-

erty if not removed in sixty days after forfeiture. The preliminary to forfeiture was a thirty-day notice to the Tacoma Railway & Power Company. The penalty for failure to operate was the passage of a repeal ordinance, which required no notice at all.

The case of *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, is not in point here at all, though greatly relied upon by appellant.

The franchise there was construed to be a perpetual one by interpretation of parties, with the right reserved to the City to "declare the necessity of removing" the poles and wires from the streets, and it was because the ordinance directing the city electrician to disconnect all heat and power wires of the company contained no declaration of public necessity, and it was not claimed that there was any such necessity, that the Court held the ordinance void. There was no question of forfeiture in the case.

A case much more nearly in point is *Calder v. Michigan ex rel Ellis*, 218 U. S. 591, where the legislature under a reservation in a charter, repealed it, and the Attorney General brought quo warranto against the corporation to oust it from further carrying on business. It was a water company rivaling the municipal water plant of the City of Grand Rapids. The case was in error to the Supreme Court of Michigan, which sustained the ouster. A plea was made for bondholders, but at the close of

the opinion the Court said:

"The only question before us now is the validity of the judgment ousting the defendants from "assuming to act as a body corporate, and particularly under the name and style of the Grand Rapids Hydraulic Company." This really is too plain to require the argument that we have spent upon it. *We may add that it is a matter upon which the bondholders have nothing to say.*"

Palestine Water & Power Co. v. Palestine (Texas Supreme Court 1898), 40 L. R. A. 203, is a case of the same general character as this where it was complained that a receiver appointed at the suit of bondholders was not made a party. The Court said (p. 206):

"This suit was instituted to revoke and set aside the contract between the city of Palestine and the Palestine Water & Power Company, as well as to annul the ordinance which granted to the water and power company the right to occupy its streets, and the state court thereby acquired jurisdiction of the subject-matter before the receiver was appointed by the United States circuit court. *Reisner v. Gulf, C. & S. F. R. Co.*, 89 Tex. 656, 33 L. R. A. 171. It was not necessary to make the receiver a party to the suit. If he desired to defend the action, he had the right to make himself a party. *City Water Co. v. State*, 88 Tex. 600; 5 Thomp. Corp. Secs. 6893-6896. The corporation, the Palestine Water & Power Company, cannot complain because the receiver was not made a party defendant, because, if he was a necessary party, the judgment will not affect any interest that he has in the subject-matter of litigation, and it would be of no benefit to the defendant to make the receiver a party."

Reserving its right under the stipulation on file, to answer the appellant's brief, appellee submits

that the judgment of the Court below should be affirmed.

Respectfully,

T. L. STILES,
City Attorney;

FRANK M. CARNAHAN,
Assistant City Attorney;
Attorneys for Appellee.

Tacoma, Washington.

10.

IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY,
as Trustee, *Appellant*,

VS.

THE CITY OF TACOMA, *Appellee*.

No. 2601

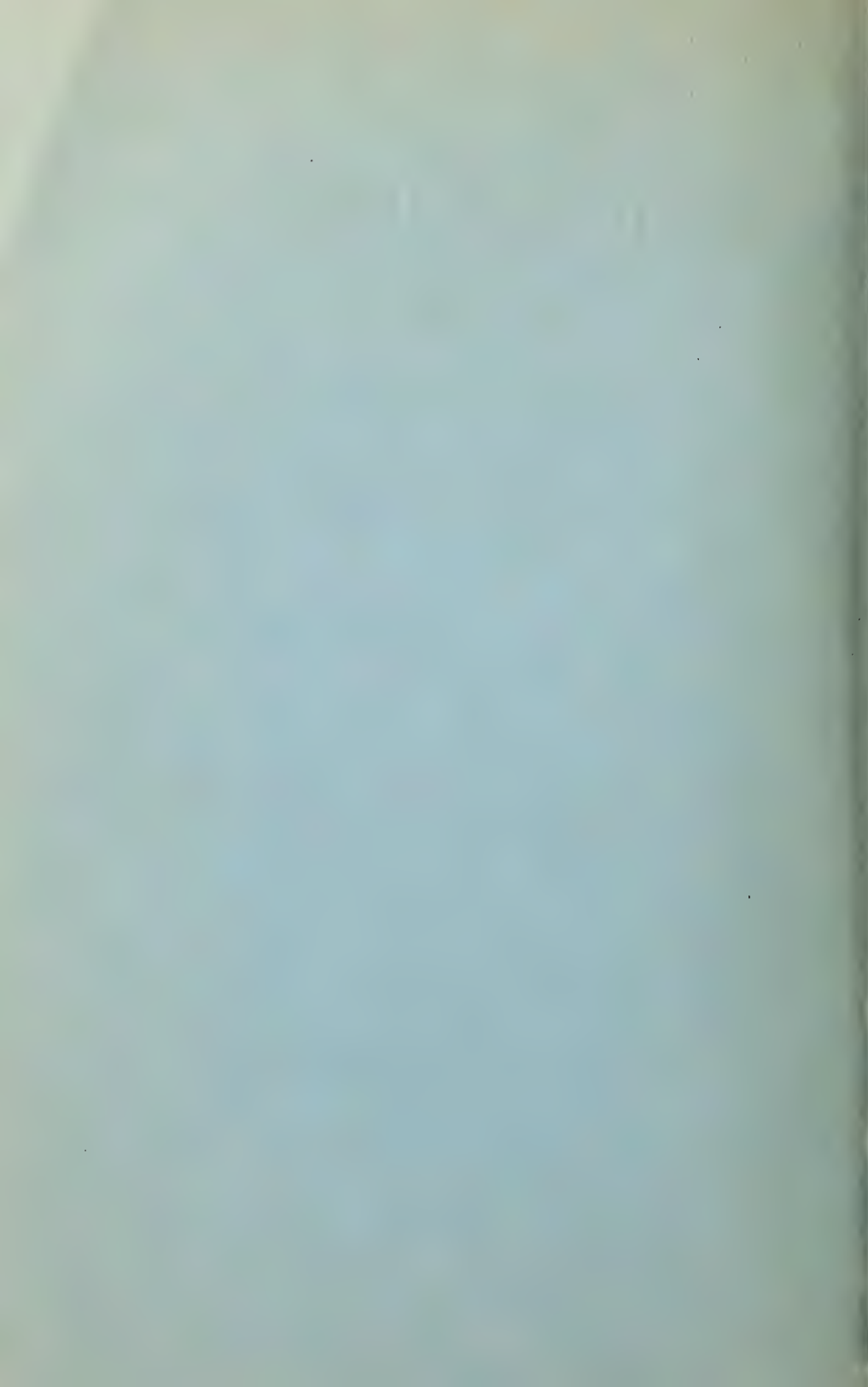
APPELLEE'S ADDITIONAL ANSWER BRIEF.
(Filed Under Stipulation).

APPEALED FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTH-
ERN DIVISION, CUSHMAN, D. J.

T. L. STILES,
City Attorney;

FRANK M. CARNAHAN,
Assistant City Attorney;
Attorneys for Appellee.

Tacoma, Washington.



IN THE
UNITED STATES CIRCUIT COURT
OF APPEALS
FOR THE NINTH CIRCUIT

OLD COLONY TRUST COMPANY,
as Trustee, *Appellant*,

VS.

THE CITY OF TACOMA, *Appellee*.

No. 2601

APPELLEE'S ADDITIONAL ANSWER BRIEF.
(Filed Under Stipulation).

APPEALED FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON, SOUTH-
ERN DIVISION, CUSHMAN, D. J.

Not having had appellant's brief at the time of the preparation of its original brief, appellee, under the stipulation on file, desires to say a few words in answer to the points made by appellant.

No argument will be wasted in attempting to combat appellant's endeavor to overthrow the construction which the Supreme Court of Washington in *Tacoma Railway & Power Company vs. Tacoma* put upon the statutes of that State. If the clear cut opinion of Judge Gose does not carry complete conviction on the point no argument we could make would do so.

It was there settled that the City had the power to make the contract it did make, and that the Public Service Act in no way affected either the contract or the conditions under which the Tacoma Railway & Power Company accepted it; and the only question remaining for all parties is whether the contract is to be carried out as it was written.

APPELLANT'S CASE.

To uphold itself in its at least doubtful positions the Tacoma Railway & Power Company resorted to the courts of its own selection and was unsuccessful.

Then, pending a petition for rehearing in the Supreme Court, it attempted to sell and, so far as it could do so, undoubtedly did sell all of the poles, wires, etc. constructed and used under its former franchise to the Puget Sound Traction, Light & Power Company, which asserted its claim to them by suit against the City in the U. S. District

Court but without success. (Trans. of Testimony, p. 20 *et seq.*)

Now comes in appellant: and what is its position?

It claims to be a mortgagee of the franchise and the property connected with operations under it.

But if it is a mortgagee its rights are all subordinate to the terms of the contract made by its mortgagor. It legally knew that if its mortgagor did certain acts or neglected or refused to do others, a forfeiture could be enforced against both of them, and nothing the mortgagee could do could avoid it.

In one place in its brief it complains that it had no notice of what its mortgagor was doing or not doing. But whose business was it to tell it of these shortcomings? As a trustee it might be supposed to keep up a show of watchfulness over such matters.

The doctrine of notice hardly covers such a case.

Moreover, the City had no knowledge of any mortgage.

The brief gives a lot of extracts from Manager Bean's talk and letters but to correct the effort at producing a false impression we cannot take the space for other citations. What we ask is a per-

usal of the testimony contained in the printed record, whereupon we prophesy the following general finding of facts, viz:

The Tacoma Railway & Power Company was determined to hang on to the lighting business as long as possible, notwithstanding the terms of its franchise and the City's notice to quit.

Its idea that it was free of the franchise prohibitions was newly born; for, in the first place, it procured the permits provided for, and secondly, when it entered into its contract with the Northern Pacific Company it provided against the contingency which it knew might arise if the City should revoke its permits. In paragraph XIII. of the contract (See Exhibit 3,) it was written:

"Should the Power Company, by reason of its franchise be unable at any time to furnish the current for lighting, then the Railway Company may at its option terminate this contract by giving to the Power Company written notice of its election so to do."

Its agents went to the City Hall to "feel out the situation". The Council was the only place to apply for any modification of the resolution or other action because it had taken over the entire matter and could rescind the resolution, amend the franchise, or do anything else it saw fit. But they did not go there. They saw Lawson, Commissioner of Light & Water, but he told them it was a legal

question and he had nothing to do with giving concessions, and took them to the City Attorney, who advised the same thing (Record, p. 82). They suggested that the City should commence a suit to test the points they were raising but were informed that the City had no suit to bring, as the ordinance was definite and clear to to what should be done; and that if there was any suit the Company would have to bring it on (Record, pp. 83, 91). The agents proposed a sort of truce, by letters signed by the manager and intended to be signed by the City's Commissioners of Light and Water and Public Works; but the signatures were refused. But in spite of all rebuffs the manager seems to have continued in a most cheerful and imaginative mood, for he construed the whole performance represented by the adoption of the two resolutions as nothing but a "threat", with no intention to carry it out—a wholly vain and undignified sham.

That is all except that it is said the City Attorney said that there was no desire to forfeit the franchise. Well, there was none; and with the protection which the ordinance gave by requiring thirty days' notice it was never supposed that the right to forfeiture which was initiated by the failure of the Company to stop the lighting business April 15th would be allowed to ripen, nor that the Company would drive the City into claim-

ing a forfeiture as a measure to enforce the terms of the ordinance prohibiting the lighting business.

Whose fault was it that it did so ripen, or that the measure forced upon the City was taken advantage of?

Such are all the facts upon which appellant seeks to base an estoppel against the City of Tacoma (Brief, p. 31).

Appellant cites a page or more of cases to sustain the general proposition that forfeitures are not favored, etc. (Brief, p. 35-41), the most of which have no relevancy, as they are mere instances of sales of real estate upon condition or covenant.

Cases like this one, where the terms and conditions of forfeiture are clearly expressed in a contract, rarely get into the books, since nobody is hardy enough to make discussion over them.

Judge Cushman readily perceived the vital point, and after referring to the language of section 11 of the ordinance he disposed of the argument thus (Record, p. 49):

“It is now contended that this language contemplates only the failure to perform those affirmative duties imposed upon the grantee of the franchise by the terms of the ordinance; that, so far as those things forbidden to be done by the grantee are concerned—as was the

right to furnish electricity for lighting purposes—it was not intended that a forfeiture might be enforced, for such a violation; that injunctive relief in such a matter would afford an ample remedy.

“It may be conceded that such relief would be more appropriate and more nearly complete—to prevent the grantee’s doing acts forbidden to it in the franchise than to compel the performance of those acts undertaken by it; but the language used shows no intent to limit the right of forfeiture as contended. One of the conditions of the franchise was that the grantee should, in no event, without a permit from the City, furnish electric power for lighting. True, the word ‘perform’, considered by itself, is more appropriate to express action than inaction; but when considered in the connection in which it was used:

‘Perform any and all conditions of the ordinance specified and mentioned:’

it is clear that it contemplates both the doing and the not doing of those things required. In such connection it means the carrying out, or the fulfilling, of all conditions of the ordinance.”

What more could be said?

If there were anything in the point “V” in appellant’s brief (p. 42), it would be completely answered by the Bell Telephone case, 103 Fed. 31. The Tacoma Railway & Power Company either obtained the franchise limited by the ordinance or it got no franchise at all. It is respectfully

submitted that every such assumption by the corporations which first beg for municipal franchises at any price until they obtain them, and then impudently set up and contend for a state of things which never existed or was intended to exist, should meet the same sort of rebuke.

The effort to argue the City out of its right to say who shall vend electric power in its streets on the theory of monopoly can certainly have little weight. As a general rule public utilities of all sorts are in fact monopolies, and they ought to be. For example, the Tacoma Railway & Power Company has an absolute monopoly of the street railway business in Tacoma. So has the Pacific Telephone & Telegraph Company of the telephone business. The people, through the Council, simply would not let any other concerns operate in the same fields. There is monopoly, if you like, but who can break it?

In *State ex rel. Telegraph Co. v. Spokane*, 24 Wash. 53, a telephone corporation attempted to compel the City of Spokane to grant it a franchise, and the same arguments about monopoly used there are here repeated. But the ruling was that merely because a franchise had been granted to one company did not make it a monopoly when the City refused another.

Appellant would have urged that because the City of Tacoma had undertaken to furnish electric

lights in its streets and to its inhabitants it must throw open the streets to any adventurer who could procure poles and buy current from some outsider, or be under the ban for monopoly.

But things are not so simply absurd.

Under its point "VI." appellant seeks to place itself in a position of superiority, unwarranted by the facts.

The ordinance (Sec. 11) contained its own code of enforcement. Under it no resort to any court was necessary to forfeit the franchise or perfect the *title* to the property and the *right* to its possession. The only notice required was that provided for, viz: a thirty-day notice to the grantee and, perhaps, the passage of an ordinance or resolution.

Of course, if resistance had been offered a suit for possession might have been necessary, since, equally of course, force is no more available to a city than to a private person. And in such a suit the question of the legality of the forfeiture could be tried; or the Company could take any other legal step it deemed necessary to contest the forfeiture.

The only one of appellant's cases which gets anywhere near this one is *Wheeling R. R. Co. v. Triadelphia*, cited on p. 55 of the brief (52 S. E. 499). The forfeiture there discussed was under an ordi-

nance very much like this one and it was not sustained because there had been several years of acquiescence in the failure to keep the street in the condition contracted for, and there had been no such notice as the ordinance required, and the Company attempted to, and was willing and anxious to make a full compliance where there had been only a meagerly substantial one. At the foot of page 510 of the report, after lengthy discussion, the opinion ends thus:

“If the injury could not be remedied, or *the railway company stood defiant, refusing to perform*, the case would wear a different aspect; but it does not. It is willing to perform to the letter—to pay to the last farthing.”

But what was the attitude of the Tacoma Railway & Power Company? It refused to obey the warnings given in strict accord with the contract; asserted that it was not bound in any way to perform its solemn undertaking; went into court to prevent the action which the contract stipulated for; and, notwithstanding the demand of the City for a forfeiture, it continued its denial of obligation and made no proffer of compliance, even in the alternative, but by its reply reiterated its defiance. This course it continued in the Supreme Court of the State without ever once appealing to any equitable consideration.

And now after all this judicial happening comes appellant and with its shadowy excuse of

mortgagee's interest for innocent bondholders, appeals to *EQUITY*! Having stood by while its principal was waging its war of repudiation against the City, months after the repeal ordinance has been passed, it takes up the same weapons and renews the fight. It makes no offer to see that the Company quits the lighting business; on the contrary it demands that it shall be restored to the full possession of it. It does not want to comply with the contract; it demands that the most important part of it be obliterated.

A similar case is *Union St. Ry. Co. v. Snow*, (Mich.), 71 N. W. Rep. 1073. The company had failed to make street improvements or to pay the City the cost of the work it had done, and the Company sought to enjoin the removal of its tracks. The question was on the failure to pay, the excuse offered being that although large sums had been invested the business did not pay; but the court said it had no power to excuse performance, because the contract was plain, and the injunction was refused.

City of Belleville v. Citizens' Horse Ry. Co., 152 Ill. 171 (38 N. E. 384), is almost identical with this case in all its legal aspects. While the trustee of the mortgage was foreclosing and after a receiver of the street railway had been appointed, the City of Belleville passed an ordinance repealing the franchise and by interpleader in the foreclosure

proceedings asked to be allowed to remove the tracks. The decree supported the forfeiture against the mortgagee on the ground that the City had the right to the enforcement of the contract as made.

A similar case is *Pacific Railroad Co. v. Leavenworth*, 1 Dillon, 393; Federal cases, No 10649.

See, also, *Spokane St. Ry. Co. v. Spokane Falls*, 46 Fed. 322.

In the Leavenworth case Judge Dillon said:

“Whether the things to be performed by the company are conditions subsequent, as claimed by the city, or mere covenants, as contended by the company, it is not perhaps material, on this application, to decide. This depends upon the intention; 4 Kent, Comm. 135, 136. And although courts incline against conditions, they will or should carry out the intention of the parties; and my opinion is that the parties here intended that the city should have the right to take possession on the failure of the company to keep its contract.”

Such was the ruling of Judge Cushman here; and we submit that his ruling should be affirmed.

Respectfully,

T. L. STILES,
City Attorney;

FRANK M. CARNAHAN,
Assistant City Attorney;

Attorneys for appellee.

City Hall, Tacoma, Washington.

